

No. 11820

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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TAVARES CONSTRUCTION COMPANY, INC., a corporation, CONCRETE SHIP CONSTRUCTORS, a joint venture, STROUD-SEABROOK, a copartnership, LLOYD S. STROUD, R. S. SEABROOK, C. M. ELLIOTT, CARLOS TAVARES, HENRY M. PAGE and DON F. GATES,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

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TRANSCRIPT OF RECORD

(In Four Volumes)

VOLUME IV

(Pages 1109 to 1457, Inclusive)

Upon Appeal From the District Court of the United States  
for the Southern District of California

Southern Division

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San Diego, California, Tuesday, February 25, 1947,  
2:00 P. M.

The Court: All present. Proceed.

CHARLES B. SHATTUCK,

called as a witness by and on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (Resumed)

By Mr. Landrum:

Q. Mr. Shattuck, I believe at the time of the noon recess you had just begun your discussion with us as to one of the problems which confronted you in your investigation or determination of the value which might have to be paid by the government for this land in case the option were exercised. Before you go into that for us, will you tell us, just briefly, just what your investigation and studies were you made or what information you had available to arrive at your conclusion with relation to the value of the land?

A. I had, as I testified before, previously, made an extensive investigation of the prices at which land had sold in the vicinity of the Destroyer Base and in the vicinity of National City. And I, likewise, had made an investigation of the leases on various tidelands along San Diego Bay. And, in addition to that, I had some experience with submerged lands at the time I had appraised the Marine Base. [929]

Q. Now, will you go ahead?

A. That information, of course, I had in my mind at the time I was making this estimate of the condition of the land as it was back in 1942, at the time the Tavares

(Testimony of Charles B. Shattuck)

Construction Company assigned its two leases to the Defense Plant Corporation and they commenced the construction of this shipyard. And in that connection, I figured that that land at that time was probably worth about \$215,000.

Q. That is, you first reached a conclusion as to the valuation of this land that the land was worth \$215,000 in 1942?

A. That is, before the construction of the shipyard was commenced, and thereafter, as shown in Exhibit Q, there are certain items, which were items of construction and expense, that were incurred by the Tavares Construction Company and paid for by the Defense Plant Corporation, which became improvements to this site in December of 1944. And in that connection, I call attention to the following items that are shown in Exhibit Q—

Q. That is the exhibit which is in evidence in this case?

A. That is right; yes. That is, clearing and dredging the roads, grading, bulkheads, spur tracks, sewers, telephone lines, water lines and air lines and power and light. I took all of those items, which totaled \$468,752, to create an [930] improved piece of harbor land such as was there in December of 1944, and upon which the shipyard itself was constructed. In other words, they started out with raw land and wound up with a piece of improved land, which would indicate from a summation or cost point that the land, as of December 23, 1944, as improved and after the government expended this money, was then worth in round figures \$720,000, about \$11,500 an acre, or about 26 cents a square foot. [931]

(Testimony of Charles B. Shattuck)

Q. That is after this amount of money had been spent?

A. After the government had spent this money.

Now, then, my next consideration was, in considering the question of whether this lease and option of the Tavares Construction Company had a value in the market, was to determine what the probable price was that the Tavares Construction Company would have to pay, assuming that option would come into being, and as near as I can figure it, because it was unknown exactly what price they would have to pay for the land, because it was being condemned and, therefore, I had to rely on an estimate of value, which I made myself, it would appear they would have to pay right in the neighborhood of \$2,400,000, which would be the probable option price which they would have had to pay the government, assuming they had the right to exercise that option.

The next question I was interested in investigating was what, in the open market on that date, would have been the most likely price a well-informed person would have paid for the site, the machinery and these facilities, because if in the open market one would not pay \$2,400,000, then that option could have no value in the open market, because there would be no profit on it. I made an estimate in that regard, and in considering that I had to go back and consider what this machinery and what these facilities were like, and to what extent they had been used, and to form an opinion as to whether [932] or not the arbitrary rates of depreciation which had been set up in the contract itself reflected what was the actual economic situation of the property in the open market.

(Testimony of Charles B. Shattuck)

That is, arbitrary depreciation is one thing. Actual depreciation and obsolescence in the market is another.

For instance, and by way of illustration, there are four wet docks that were created. Assuming the condition where there was no war involved and we were back on a peacetime economy, it is my opinion there would certainly be no use for four wet docks in a city the size of San Diego. There would possibly conceivably be use for one, so it is conceivable that an informed buyer, who was figuring on the use of the property for industrial purposes, would be willing to pay the full cost of one wet dock; in other words, he would make some allowance for that. I would also take into consideration the fact that most of this equipment and machinery had been used probably seven days a week and maybe as much as 20 hours a day; in other words, practically constantly during the war, because they were working all the time.

Q. Now, I believe you said in that connection that you had, for your information, the letter from Mr. Eisenman, which I believe is in evidence in this case as Exhibit 4, did you not? A. Yes.

Q. And what did you find in that letter with relation [933] to this depreciation?

A. Well, it seems to me that in that letter the remark was made to the effect that the yard had been used, very heavily used, and, in effect, practically the full use value of the equipment had already been used up, and that is an item I think that any informed buyer would have carefully considered. They would have gone carefully over that batching plant to make sure as to just what condition that was in, and so, taking all those things into consideration, it was my conclusion that in the open market

(Testimony of Charles B. Shattuck)

this particular piece of land on the 23rd day of December, 1944, and the machinery and equipment, as a unit, would not have had a market value in excess of about \$1,985,000. And that being the case, it was my conclusion that the option itself, even assuming it came into being, had no market price which it could command, because it would cost one more to obtain it from the United States of America than it actually would be worth in the market.

Q. Now, let's take up the lease portion of this Exhibit W. You understood that it contained some sort of a provision with relation to their having a lease on it up until 1947, with an option for an additional two years?

A. That is right.

Q. What did your studies develop with relation to their leasehold interest? [934]

A. With relation to the leasehold interest, it was my opinion that the terms of it were very uncertain and conjectural, so far as any possible purchaser was concerned. In other words, in the first place, it was not assignable, they could not pledge it or sell it without the consent of the Defense Plant Corporation, and the country was involved in war, where the government itself needed those kinds of facilities, and, therefore, it appeared doubtful that such a consent could be obtained.

Likewise the lease provided that this site, and this yard, and these facilities could only be used for the construction of boats for the government, and that if at any time it was not so used, the government had an option under paragraph (b) of paragraph 14 to transfer these facilities to any other department of the government, and if it elected, if the government should elect to do so, the

(Testimony of Charles B. Shattuck)

lease could be canceled and no option could be had, and, therefore, you might say that the person who had this lease was merely there at the will of the government.

Q. You have heard some discussion here with relation to their having a right to use that rent-free, have you not? A. Yes.

Q. What did you find out with relation to that?

A. Well, from some correspondence which I had, and which came to my attention,— [935]

Q. That is this Exhibit 4 in this case?

A. I believe that is the exhibit number, yes.

Q. All right.

A. It is indicated there that they had reached an agreement, apparently, as to the rental that would be charged where the facilities and the yard were used for private work, which was set at the rate of 10 cents a man-hour, and I assumed, in analyzing the question of whether the lease and option had any value in the market, that if this yard were to be used for private work of any kind, that there would be a very substantial rental that would have to be paid, and that if they were not building boats for the government and if they didn't have private work, why, under the terms of the lease the lessee was still obligated to pay the insurance, to pay the taxes, to pay the upkeep, and to maintain the property, which would amount, in my opinion, to a very considerable sum of money, from the standpoint of expense, and those are the matters that I considered.

Q. In other words, it is your understanding of Exhibit W that they only had the use of the yard rent-free when they were constructing boats for the government?

A. Yes.

(Testimony of Charles B. Shattuck)

Q. Now, did you ascertain the extent of their further obligations to the government to construct boats?

A. Well, my information that I uncovered was that [936] they had practically completed their contracts, they had two boats that were yet to be completed, that is, as of December, 1944, and that apparently their work in that regard was tapering off. Also in—I forget which that exhibit number is,—but referring again to one of those letters, and I believe I will get the number of it—anyway, in one of those letters it was indicated by the Tavares Construction Company that they had used some 7,000,-000 man-hours of labor in 1943 and that had decreased to an estimated number of man-hours in 1944 of only 2,000,000 man-hours, which shows that only a very small amount of work, as compared with the previous year, was done, and I think that an informed person, thinking about buying a lease and option of this kind involving a shipyard of this character, would have certainly given serious consideration to that fact. [937]

Q. Now, Mr. Shattuck, in your study of Exhibit W, which recites, at the top, "Plancor 407," did you find any provision in there with relation to the consideration which the Tavares Construction Company gave for that agreement? Do you find in there anything about their going to have a supervision fee?

A. No; there was nothing in that agreement that I found with reference to the Tavares Construction Company being allowed anything for a supervision fee.

Q. Now, let me ask you whether or not, from your experience that you have given us here in the general real estate and appraisal business and your own personal investigation upon these lands and your own personal

(Testimony of Charles B. Shattuck)

studies, you have an opinion with relation to the market value of the interest of the Tavares Construction Company and associates, which they have in this action by virtue of the so-called leasehold interest, coupled with an option, known in this case as Exhibit W.

A. Yes; I have an opinion.

Q. Tell this court and jury what it is.

A. In my opinion, it was zero, that is, nothing.

Q. Mr. Shattuck, just sketch briefly for us your reasons, other than those that you have given us, for expressing the opinion that that lease couldn't be sold on the open market for anything.

A. Well, it is my opinion that the whole thing was too [938] speculative and conjectural; that there was no assurance there for any possible purchaser that he was going to be allowed to utilize this property because of the various provisions of the lease itself or the document itself. And, further, it was my opinion that the option was of no particular value because of the reason that I have already expressed; it would cost more than you could realize out of it.

Q. Did you analyze that Exhibit W from the standpoint of whether or not if that option would ever come into being, a purchaser would ever even consider that?

A. Yes; I think they would have and I based that information which came to my attention particularly through this series of letters by which it was indicated, prior to December 23, 1944, that the option wouldn't come into being because the Navy had already pretty strongly indicated its intention not to take it over and, therefore, there was practically no likelihood, in my opinion, of that option ever coming into being. Appar-

(Testimony of Charles B. Shattuck)

ently, the government was about to proceed under its rights under Section (b) of Paragraph Fourteen. The government reserved to itself a right to transfer this site and these facilities and this machinery to any other department of the government if it needed it and, apparently, it elected to do that. And I think a purchaser, in considering this option, would have investigated all of those things and given very careful consideration to them, [939] and I think he would have reached the conclusion that it was worth nothing. And that is the opinion I reached.

Mr. Landrum: All right, gentlemen. You may cross examine Mr. Shattuck.

#### Cross Examination

By Mr. Monroe:

Q. Mr. Shattuck, I was interested in your statements about privately owned tidelands and I wondered if you and I mean the same thing when we talk about tidelands. Do you have reference to that land which lies between the mean high tide line as established by the Army Engineers and the pierhead line? A. Not necessarily.

Q. Well, that is what I wanted to be sure of. I wanted to know whether we were talking about the same thing. I think you mentioned something of some lands either in the Bay or around Coronado as being submerged lands or something of that sort. What did you refer to?

A. I might point out on Exhibit K the Coronado Heights land which I appraised for the Spreckles Company. There was a good deal of land on the easterly shore of that upland which, during high tide, was covered with water, and the land itself extended out to the mean

(Testimony of Charles B. Shattuck)

high tide line, to the edge of the Bay. The same thing was true on some portions of the hog ranch property which I appraised for Spreckles. The actual [940] ownership of the land extended to the mean high tide line, which would be the same as the bulkhead and pierhead line. Certain portions of that ownership, however, were such a low elevation that at high tide they were covered by water from the Bay. Likewise, the same thing was true of much of the land that was in the Destroyed Base before that fill was made out there. In other words, there were certain sloughs and so forth that extended back toward the Bay and, during periods of high tide, that water ran in and covered over much of those lands, which you might say were mud flats, referred to as tidal flats and frequently referred to as tidelands, though perhaps, technically, not tidelands in the sense you are thinking about as being lands between the bulkhead and the pierhead line.

Q. I was perhaps being a bit technical, but the lands which you referred to, then, were lands which went to the mean high tide line? A. That is right.

Q. And what we have spoken of as the tidelands which are referred to in the statutes relative to State tidelands. They start at that point and go out to the pierhead line, is that right?

A. In most cases, that is true. In some cases, that is not true. For instance, take in the Los Angeles Harbor Area, where they established the Inner Bay Exception Line. That [941] was a line that was adjudicated and left certain lands in private hands between that adjudicated line and the old high tide line, which were at one time actually tidelands in the sense that you are thinking about,

(Testimony of Charles B. Shattuck)

and those are lands that are in private ownership. I just appraised one piece for the Bannings, that the City of Los Angeles was buying, at the west end of the West Slip in the West Basin, which was very definitely tideland.

Q. Then, there was nothing that you had reference to around San Diego Bay that was outside of the mean high tide line, that is, on the water side of it?

A. No; I think there was nothing that, you might say, was seaward of the bulkhead line or the mean high tide line. However, along the westerly side of San Diego Bay, there at Coronado Heights and on the hog ranch and also on the Coronado golf course land, on the Bight and on the Bay, the mean high tide line and the bulkhead line and the pierhead line are all the same until such time as the Army Engineers cause some realignment to be made.

Q. What you mean is that there hasn't been any pier-head line established, is that right?

A. That is right. In other words, they haven't dredged in there yet and it is virgin territory and it is impossible to tell at this time where they will establish those lines.

Q. Those pieces that you have referred to are inwest, [942] near the deep water channel?

A. They are as near the deep water channel as the subject property in so far as the water which is immediately adjacent to them is concerned. What I have reference to, in order to make myself clear, is that the water, which is known as Area A of the subject property, was actually shallow water, or it was at least in 1942, and the same thing is true with water about the same depth and adjacent to the old hog ranch, and the same thing was true along the northerly side here of the land, which was

(Testimony of Charles B. Shattuck)

a portion of the old Coronado golf course. In other words, they all required a certain amount of dredging before they could be used for shipping.

Q. You have mentioned something about some land to the north side of Mission Bay. To what land do you have reference?

A. I had reference there to a piece of ground, that used to belong to a party here by the name of Nunn, as I recall it. It is in the neighborhood of something like 100 acres. That was land which, during periods of high tide, would be flooded by the tidewater. However, that land was all landward of the mean high tide line.

Q. Then, that is not tideland as we have used the term here?

A. Not tidelands in the technical sense that you are thinking of and as lying between the bulkhead and pierhead [943] line.

Q. Now, do you know of any lands between the mean high tide line and the pierhead line, fronting on deep water, that was salable in 1942?

A. That was salable in 1942?

Q. Yes. A. Yes; I think so.

Q. Well, what?

A. I think that the Banning piece on the west slip of the West Basin in Los Angeles was available in 1942.

Q. How big a piece was it?

A. My recollection of it offhand was that it was about in the neighborhood of 20 acres.

Q. Now, was that between the mean high tide line and the pierhead line? A. Yes; it was.

Q. And that was in private ownership?

A. Yes; it was.

(Testimony of Charles B. Shattuck)

Q. And when did it become in private ownership?

A. At the time they established the Inner Bay Exception Line in the Harbor of Los Angeles.

Q. That is, in re-establishing lines, that was a piece that had theretofore theoretically been inside the mean high tide line and was found to be outside, is that right?

A. Yes, sir. In other words, frequently in a bay they [944] adjudicate or change the mean high tide line and, if someone, perchance, happens to have a piece of property that is in the right location, he becomes the owner of it.

Q. What was that piece used for?

A. That piece, in 1942, was not in use. It was in private ownership. But it was harbor land available for use.

Q. Do you know of any other piece at that time?

A. Yes; there were other lands that were lands which had been tidelands. The site of the Richfield and Rio Grande Oil Company terminal in Long Beach Harbor is another piece of privately-owned tideland.

Q. How big is that?

A. I don't recall offhand. My recollection is probably five acres.

Q. Do you recollect any others offhand?

A. Well, to give you specifically the piece, it is rather difficult for me to do. I know that in the San Francisco Bay area there are quite a few parcels of land there, that run out to fairly deep water, that are privately owned, but I cannot give you the exact location of this property.

Q. You wouldn't be able to say whether those pieces actually went out to the pierhead line or not, however?

A. I believe in those particular locations the pierhead [945] lines have not yet been established.

(Testimony of Charles B. Shattuck)

Q. Let's figure that just a moment. Let's take a situation where say you and I own a piece of land that goes down to the mean high tide line and may be partially submerged, and the bulkhead and the pierhead line have not been established, and along comes the Engineers and establish a bulkhead line out quite a ways, and out a little farther they establish the pierhead line, and then they come along and dredge and fill in between the bulkhead line and the mean high tide line. You are not along on the ocean front, are you?

A. No. But you are in close proximity to it. And in that situation you might not be any different than you are on these lands we are talking about here, where you are back of the bulkhead line, where your property extends around 1400 feet at a maximum back of the bulkhead line. So you are quite a distance from the water there, too. So it really doesn't make a great deal of difference. The fact that you are in close proximity and where you can get out to the water is the thing that is important.

Q. The subject lands, however, do run out to the pierhead line? A. That is true.

Q. And between the bulkhead line and the pierhead line they can't fill? [946]

A. Between the bulkhead line and the pierhead line they can't do anything without the okay of the United States Army Engineers. That is like a public highway.

Q. I am not sure that I understood you, and correct me if I didn't, as to the status, as you understand the land to be, of your first valuation. My recollection of what you said wasn't too clear. Were you assuming that

(Testimony of Charles B. Shattuck)

at the time of your first valuation, when you gave the figure of \$251,000, that land was filled?

A. Yes, sir; it was filled back of the bulkhead line.

Q. That was what I wasn't clear on. In other words, you understood the fact to be that the filling of the land itself was some time prior to the Tavares contract?

A. That is correct; that land was filled from the spoil that was dredged from the main channel at the time it was deepened. And at the time I took that into consideration, in 1942. In other words, before Tavares started in on this construction work on this shipyard, Parcel A was not dredged except for the dredging that had been done by the San Francisco Bridge Company. But the land back of the bulkhead line had been filled with this spoil from the main channel.

Q. That filling in and dredging of the main channel was in 1938, was it not? A. That is right.

Q. And that was at the time they made the deal between [947] National City and the government and gave the government 90 some acres of land, and the government didn't dredge it, is that right?

A. As to those facts, I can't testify because I am not familiar with them.

Q. Anyway, it was 1938?

A. Yes, sir; that is right. It was somewhere in that neighborhood. And this land back of the bulkhead line was what you would call rough filled.

Q. In any event, in making your valuation, you did not eliminate that filling but took it into consideration?

A. Oh, no.

(Testimony of Charles B. Shattuck)

Q. In other words, you took the land just as it was, then?

A. That is right. Without the roads, without the bulkheads, without the sewers, without the water, without the lights and without the power, it was just a raw piece of, you might say, harbor land that was yet to be developed. [948]

Q. So you eliminated from that figure any improvements that the San Francisco Bridge Company put on it?

A. That's right. I testified that it was my opinion that this land in 1942 had a value of \$251,000, exclusive of the work—

Q. I see.

A. —of the San Francisco Bridge Company, but including the spoil or fill that was placed upon the land back of the bulkhead line taken from the main channel at the time it was dredged.

Q. You have testified that at some time or other in your investigation you found that a portion of these improvements, as they are indicated on this model here, had been removed? A. No, I don't think I testified—

Q. I thought you stated that at some time or other you found, in making your observations, that the Navy had then taken over and that a part, at least, of the improvements had been removed?

A. Oh, yes, I know what you are referring to now. Yes, that is true, that at the time I went to look at the property again, which was a few weeks ago, the Navy was in possession and had made considerable changes so that if one went there today they would not have found the picture as indicated by this model. [949]

Q. Did you know when the dismantling of the improvements as shown on here was started?

(Testimony of Charles B. Shattuck)

Mr. Landrum: Just a moment. That is objected to, if the court please. We are concerned here, in so far as counsel's clients are concerned, with the valuation on November 10, 1942, so it does not make any difference what occurred subsequent to that time. As to Tavares, it is December 23, 1944. I feel it is not proper to go into anything the Navy has done subsequent to that time.

The Court: Objection sustained.

Mr. Monroe: That is all.

Mr. John M. Martin: If the court please,—

The Court: Yes.

Q. By Mr. John M. Martin: Mr. Shattuck, had the United States Government entertained on the 23rd day of December, 1944, the same opinion that you have expressed from the witness stand as to the value—

The Court: Just a moment.

Mr. John M. Martin: Will you read as far as I have gone?

(Portion of question read.)

Mr. John M. Martin: May I just start my question anew, your Honor?

The Court: Yes, start it again, Mr. Martin, and we will proceed with this room this way for a few minutes. We want the air, but we must conduct the proceedings in court so that [950] they will be intelligible. Leave the windows open for a while, and if there is not much activity in the air we can have the benefit of the fresh air. Otherwise, we will have to close them.

Q. By Mr. John M. Martin: Mr. Shattuck, had the United States government on the 23rd day of December, 1944, been of the same opinion as that which you have just expressed from the witness stand relative to the fair market value of the lease and option rights held by Con-

(Testimony of Charles B. Shattuck)

crete Ship Constructors, do you know of any reason why they would have thought it necessary to condemn in this action, under date of December 23, 1944, the lease and option then held by Concrete Ship Constructors?

A. Yes. I think that would be required, to include the Tavares Construction Company as a defendant in the action because they had an apparent interest in the property.

Q. Why couldn't they, under your understanding of this lease, merely have notified the Concrete Ship Constructors that they intended to exercise their right of priority that you have discussed at length, as set forth in the lease?

A. Well, of course, that goes into the realm of speculation there, as to why they did. They elected to condemn instead of exercising their rights under paragraph (b). It would appear from the correspondence that they desired to exercise their right under paragraph (b), but apparently were [951] resisted by the Tavares Construction Company, so they elected to condemn. That is the way I would look at it.

Q. So it is your understanding that under the lease the government had a right, through exercising its priority rights therein granted, to merely take over and use this property, and thereby end and terminate all rights of Concrete Ship Constructors?

A. I don't think there is any question about it.

Q. It is upon that understanding of the agreement that you have based your testimony in this case?

A. No, not at all. That is just one of the elements. In other words, it was my opinion that any informed purchaser would have carefully considered every clause of

(Testimony of Charles B. Shattuck)

that lease, as well as the property, the machinery and facilities, they would have looked at it from every angle, and from any angle they looked at it, I think they would come back to the same conclusion, that they would pay nothing for it.

Q. You don't think it would have made any difference to a purchaser if you, as a broker endeavoring to sell the lease and option, had calculated the fair market value as of January 1, 1950, and endeavored to explain to a prospective purchaser the fact that he had the right to purchase on January 1, 1950, and that that was one right that the government could not preclude him from exercising, no matter what kind of a notice they served? Is that in accordance with [952] your understanding?

A. No, I never read anything like that in the lease, that they had a right to buy the lease on January 1, 1950.

Q. You read in the lease under paragraph 12, that was granted for a term of years that was to expire or terminate on December 31, 1949, with an automatic option for renewal on December 31, 1949?

A. I think you are mixed up there, counsel. The lease provides—

Q. Will you turn to paragraph 12, please?

A. The lease provides that the term should end on December 31, 1947, and be automatically renewed until December 31, 1949, and the lease further provided in paragraph 12 that it could be canceled by either party, providing the property was no longer needed for the construction of boats for the government, and there is set up in paragraph 12 a method of arbitration for settlement of that question if there was any difference of opinion between the parties, as to whether the property

(Testimony of Charles B. Shattuck)

was needed for construction of boats for the government, and it also provided in paragraph 14 in clause (a) that the government itself could cancel provided the contracts to build ships by Tavares had been substantially completed, or provided it were terminated before they were substantially completed; and it also provided in paragraph (b) of paragraph 14 that if the government required priority [953] for this site, machinery and facilities for its self or any other branch of the government, it could cancel this lease.

Q. Don't you think we might reconcile our ideas a little more readily if we stick to the one question of priority until we have finished with that question? This is a rather voluminous agreement, and I want you to discuss all of its terms, but for the moment let us talk about the right accorded the government of priority, and see if you and I have the same understanding as to what the lease says on the subject of priority.

Is it your understanding that if the government on December 23, 1944, had said, "The government will now exercise its rights to priority use of this lease," that that action on the part of the government would have ended all rights of the Concrete Ship Constructors under this lease?

A. So far as occupying and using these facilities were concerned, yes.

Q. As you read this lease, when the date December 31, 1947 was reached, commencing in paragraph 12,—by the way, do you have a copy of this lease, Mr. Shattuck?

A. I have an outline of it here, so that I am pretty familiar with it.

The Court: You had better take this copy.

(Testimony of Charles B. Shattuck)

Mr. John M. Martin: I do not like to deprive the court of its copy. [954]

The Court: That is all right.

The Witness: I am familiar with it.

Q. By Mr. John M. Martin: I am handing the witness a copy of Exhibit W. Now, directing your attention to paragraph 12, where it states:

"TWELVE: Subject to termination upon the terms hereinafter in this paragraph TWELVE provided, Defense Corporation hereby agrees to sublease the Site and to lease the Facilities and Machinery to be acquired hereunder, and does hereby sublease the Site, and leases the Facilities and Machinery to be acquired hereunder, to Lessee and Lessee does hereby lease and sublease the same from Defense Corporation for a term ending December 31, 1947, which term, upon its expiration, shall be automatically extended, subject to similar termination for an additional period ending December 31, 1949."

Now, is it your understanding that had no condemnation been filed and had no notice been served by either party that upon the expiration of the lease there, the first period, December 31, 1947, that Concrete Ship Constructors could have on the first day of January, 1948, elected to purchase? [955]

A. No, they certainly could not; not under that.

Q. And is it your understanding that upon the expiration of the term ending December 31, 1949, that the lessee could on January 1, 1950, have elected to purchase?

A. No, he could not; not in my opinion.

(Testimony of Charles B. Shattuck)

Q. You did not understand, and do not understand now, that the lessee had any such right?

A. No, he had only a right to purchase that equipment, in my opinion, under two conditions; one, that the lease was cancelled under Paragraph Twelve or, two, that it was cancelled under clause (a) of Paragraph Fourteen. Otherwise, they had no option.

Q. If that be your understanding, then I direct your attention to Paragraph Fifteen of Exhibit W, which states, "Upon the expiration or termination of this lease or extension thereof pursuant to Paragraph Twelve hereof,"—now, just stop for a moment with the portion I have read. Is the date, December 31, 1947, to which I have directed your attention in Paragraph Twelve an expiration date within the meaning of the first sentence of Paragraph Fifteen?

A. I think that the word "termination" there refers to the termination or cancellation of the lease pursuant to that paragraph.

Q. I direct your attention again to this copy of the lease, and I wish you would take it, if you don't mind, and I [956] direct your attention to the meaning of the word "expiration" as used in Paragraph Fifteen:

"Upon the expiration or termination of this lease,"—

A. "—pursuant to Paragraph TWELVE."

Q. Yes. A. Yes.

Q. Paragraph Twelve provided, did it not, two expiration dates, one December 31, 1947, and a second, December 31, 1949? A. That is right.

Q. Both of those dates, as you understand it, were expiration dates? A. That's right.

(Testimony of Charles B. Shattuck)

Q. So that upon the occurrence of either one of those dates, the option under Paragraph Fifteen would have come into being?

A. Not according to my understanding, no.

Q. Upon what do you base any contrary understanding?

A. On the fact that these facilities are owned by the United States of America, and that it reserved to itself the right to transfer these facilities, this site and this machinery, to any other branch of the government, if it needed the priority for same, and that it wasn't giving an option to Tavares except under two conditions.

Q. Now, the priority provision that you speak of is in [957] Paragraph Fourteen, so I direct your attention to Paragraph Fourteen of the lease, which reads in part:

"Defense Corporation, by notice in writing with the approval of the Maritime Commission noted thereon, may, in addition to all other rights with reference to termination under paragraph TWELVE hereof, cancel this lease or extension thereof, in the event (a) all or substantially all of Lessee's contracts with the Government, at any time outstanding, for the construction of concrete barges and other boats shall be terminated or cancelled prior to completion, or (b) the Government shall request priority for itself or others with respect to the use of the facilities to be provided hereunder and Lessee shall fail or refuse to give such priority."

Is it your understanding that in the event lessee gave such priority pursuant to such a request, so that the lessee was not in default in that respect, that nevertheless the lease ended merely by virtue of the request for priority?

(Testimony of Charles B. Shattuck)

A. Well, if they made such a request, so far as Tavares Construction Company was concerned, they would be out.

Q. Well, now, let's follow that along. Upon what do you base that conclusion? You say they would be out. They would still have the right to exercise their option on either January 1, 1948, or January 1, 1950, would they not? [958]

A. Not the way I would read it.

Q. Why not? That is what I am trying to get together on with you, Mr. Shattuck. Will you explain to me why?

A. Well, it may be that your question of why illustrates why I think this lease, coupled with an option has no price in the open market, for the reason that it is so conjectural and subject to so many interpretations and is so speculative that I don't believe any informed purchaser would dare to buy it. In other words, I apparently read and look at it in one way as a layman, and as a realtor, and as one who has to analyze leases, for one thing, from the standpoint of the fellow who is going to operate under them; and you, apparently, read it in some other way as an attorney, and perhaps if some other lawyer read it, he may read it some other way, and so you get into a law suit, and when you talk about a price on the market, nobody wants to buy a law suit, and so nobody wants to buy it at any price.

Q. Then point out to me any provision in this case where there is not set forth in plain English language the rights of the parties.

A. Well, I think that I can read English, and I have carefully reread this lease dozens of times, and apparently you have, too, and apparently get a different interpretation on the meaning of certain words.

(Testimony of Charles B. Shattuck)

Q. I am trying, Mr. Shattuck, to get before the jury [959] wherein we differ, if I can, and I solicit your aid in that respect.

A. I will be very glad to help you, sir.

Q. It is your understanding, I take it, that Concrete Ship Constructors would be out, and by that expression you mean they would no longer have any right of any character or nature whatsoever; in the event the government exercised its right of priority?

A. That is my opinion. In other words, I think the Tavares Construction Company, under the terms of this agreement, was merely there as an operating manager and agent for the United States of America, building ships for the war effort.

Q. Why, then, did the lease contain the provision, "and Lessee shall fail or refuse to give such priority"?

A. Well, because, and then you may say quite apparently from the correspondence they did contend they had some right there, and the government had to be in a position because of the war to make—to take immediate action.

Q. I will admit, for the purpose of discussion, that the Concrete Ship Constructors did contend they did have a right. But let's get back to the meaning of these few words, "and Lessee shall fail or refuse to give such priority." What could have been the object of putting such a proviso in this lease, if they were to lose all their rights notwithstanding the fact they did give such priority?

A. I don't know. I didn't write the lease, but, as I interpret it, under that clause the government certainly reserved for itself the right to take these facilities and

(Testimony of Charles B. Shattuck)

ask the Tavares Construction Company to step out of the picture and turn them over to others to run and operate.

Q. Now, you say they reserved the right to take them. Let's be more accurate. The agreement says, "or (b) the Government shall request priority for itself or others with respect to the use of the facilities to be provided hereunder,"— A. That's right.

Q. So the priority right had only to do with the use?

A. That is all the lease had to do with, is the use, too.

Q. So that if the government exercised its right of prior use of the facilities and machinery, as it had a right to do, and the Concrete Ship Constructors accorded such priority when requested and the United States government continued in possession and retained such prior use until the termination of the lease, on December 31, 1949, what is there in this writing that you find that says that Concrete Ship Constructors could not have had the right to purchase on the expiration of that lease, according to its terms on, to-wit, December 31, 1949? In other words, what is there in there that would have kept Concrete Ship Constructors from stepping [961] up and saying to the United States government, "We are now ready to purchase this shipyard, complete with its facilities, and it was your duty under the contract to pay all insurance, taxes and upkeep on it for the entire five-year period since December 23, 1944, when you first commenced to use it." What is there in this agreement which to you, and under your interpretation, bars the Concrete Ship Constructors from saying on January 1, 1950, "Here is our option price. We have calculated the depreciation in accordance with our lease agreement, set forth on Exhibit Q, and after that credit and reduction of the option price, we,

(Testimony of Charles B. Shattuck)

on January 1, 1950, demand a deed to this property"? Just tell me and tell the jury in your own way, and I don't want to interrupt you, anything and everything that you think that would have precluded the Concrete Ship Constructors from electing to purchase on January 1, 1950, merely because the government had exercised the right of priority? Let's limit it in this question to the government having requested the right of priority.

A. Well, I would answer your question or statement in this way, that under paragraph (b) or clause (b), rather, of paragraph 14, the government reserved to itself the right to use for itself, or for others, this particular property, and they elected prior to the expiration date to do so, and, therefore, there was no option because they forestalled it [962] by their own action. The government did not grant the option. As I understand that lease, there were two things that had to happen before the option ever came into being, and it didn't come into being, and because it was speculative in that respect, in my opinion, it had no value, was worth nothing. And even assuming—even assuming that your position is correct, that my interpretation is wrong and yours is right, and they had that option, it is still my opinion it is worth nothing because they would have had to pay more for the site and for the used facilities and machinery than the entire property was worth or would have been worth in the open market.

Q. Have you calculated what the option price of the facilities and machinery would have been on January 1, 1950? A. No, not in 1950, but—

Q. Will you turn to Exhibit Q and very quickly discuss with me,—do you have a copy of Exhibit Q, Mr. Shattuck? A. Not with me.

(Testimony of Charles B. Shattuck)

Q. Turning to the last page of Exhibit Q, I direct your attention to Schedule 1. The original cost there shown is \$1,999,000 odd. That was a class of improvements relative to which the depreciation was five per cent; is that correct? A. The arbitrary rate, yes.

Q. As set forth in the lease?

A. That's right. [963]

Q. So that if the lease had run five years from December 23, 1944, until the exercise of an option on January 1, 1950, there would have been five years additional depreciation at five per cent per year, or a total of 25 per cent, and, therefore, you would arrive at the additional depreciation as to Schedule 1 by taking 25 per cent or one-fourth of \$1,999,796.75; is that correct?

A. That is right.

Q. And you would go through the same process with Schedule 2, as to the total cost of \$603,000 odd, except that you would take 10 per cent depreciation per year, for each of the five years, or an additional 50 per cent depreciation?

A. Not additional 50 per cent, but a total of 50 per cent.

Q. Five years from December 22, 1944 to December 23, 1949 would be five years additional?

A. Oh, that is right.

Q. And at 10 per cent per year that would be an additional 50 per cent? A. That's right.

Q. So you would have to take one-half of the \$603,023.04 as additional depreciation that would occur prior to December 31, 1950; is that correct?

A. That is right. [964]

(Testimony of Charles B. Shattuck)

Q. With reference to the other items of portable durable tools and automatic equipment, they would have been completely written off within the five years at 25 per cent depreciation, so that the remaining price under the option, which as of December 23, 1944, is shown there in the last column to be \$30,956.75 would be completely depreciated, would it not?

A. It would have been wiped out, that is right.

Q. So that when you add the total additional depreciation—

Mr. Crouch: Wait, please, Mr. Martin.

Mr. John M. Martin: All right.

Q. By Mr. John M. Martin: So that, when you add the total additional depreciation that would occur, according to the original schedule for depreciation in the lease, there would have occurred during the period from December 23, 1944 until December 31, 1949 a total depreciation of approximately \$832,000, in addition to that calculated on Exhibit Q; is that correct?

A. I haven't made the calculation. If you have made it, why, I will take your figure.

Q. Am I to understand that before expressing your opinion that this lease was worth nothing, you made no such calculation?

A. No, for the reason that it wouldn't make a great [965] deal of difference. In other words, the machinery and facilities would be five years older, and the depreciation you are taking is an arbitrary depreciation, and probably would not be sufficient. Probably it would be more than that actually, if they made any use of them at all. And, furthermore, many of these things at a future date, deferred back to today and discounted, would bring

(Testimony of Charles B. Shattuck)

us out at about the same price. In other words, an informed purchaser just simply would say, "I still would pay nothing."

Q. In other words, you jump to your conclusion without making the calculation or approximating the figure?

A. No, I didn't jump to my conclusion. I made a very careful study, but I didn't go into the realm of what might happen five years from now. It has been my experience as a real estate broker and appraiser that when people are talking about the market value of property as of a given date, they are a lot more interested in what happens right at that time and what happened immediately before that time than they are in what is going to happen five or six years from that time.

Q. You have proceeded on the theory that it was not proper, then, I take it, for you to take into consideration or express a value as to any property right that had a speculative value?

A. I don't think you can where it is a pure speculation. [966] Property may have speculative value or a chance for a speculative increase in value, and that would affect its value now, but to take a legal document and to speculate as to what may or may not happen under that legal document and expect somebody to pay you something for it in the market, you just don't do it.

Q. You said that under your viewpoint the option had never come into being? A. That's right.

Q. You don't understand, then, that this contract, Exhibit W, contains by its terms an absolute option, an absolute grant to the lessee of an option?

A. I don't understand that, and even assuming you are right, as I said before, assuming you are right and that

(Testimony of Charles B. Shattuck)

I was wrong, it is still my opinion that the lease coupled with an option had no value.

Q. So that to arrive at the option price as to the facilities and machinery as of January 1, 1950, it would have been necessary to deduct from the option price stated on Exhibit Q of \$2,141,236.49 an amount which I have approximated as being in excess of \$800,000.

A. All right. Then you still have the buyer, and when he went to look at that deal, he would say, "Well, let's see. This gear is five years old now, and it was used three years, approximately three years during the war full [967] tilt, and it is now five years older. I don't think I would give very much for it."

I think the buyer would say, "Now, these buildings that were built out here, they are board and bat building." The Administration Building has probably two or three times as much area in it as anyone would need for a private undertaking, and they would say, "Well, I don't think, considering its age and type of construction, I would give you very much for it."

Then they would go over and look at the four wet docks, without any bottoms in them, and I think they would say, "Well, in a city the size of San Diego, we might just as well write those off right off the bat." There goes about \$1,000,000. He would say, "We can write that off. We wouldn't give a dime for it. It has no particular use."

So I don't think if an informed person looked that whole layout over and considering he would have to pay what he would have to pay the government to get it, I don't think he would, and I think he would say, "Uncle, you keep it."

(Testimony of Charles B. Shattuck)

Q. I understand what you are saying, but you haven't told me, and what I am trying to get before the court and jury now is the fact as to whether you gave consideration to certain things that are stated in this lease and option. Did you give any consideration to the question as to whose obligation it would be to maintain this shipyard in the [968] event the government exercised the right of priority for the five years up to December 31, 1949?

A. I have already testified that if they elected to exercise that right of priority under clause (b) of paragraph 14, Tavares would be out.

Q. Let us assume, for the purpose of discussion, that you are wrong in that. Has it been your experience that the United States takes pretty good care of its shipyards, facilities, machinery and equipment?

A. I think I would answer that, "Yes."

Q. Do you understand whether or not the United States Government pays taxes on facilities and machinery that are permanently affixed to real estate subsequent to the date it has condemned and acquired the fee title?

A. The Defense Plant Corporation in using equipment of this was subject to taxes, insurance, and so forth.

Q. Just a moment. I don't think you understand the question. Read it, please.

(The question was read.)

A. Oh, not subsequent to the date of the condemnation, no.

Q. So that subsequent to the date of declaration in this case, whereupon the fee title passed to the United States government, is it your opinion that the government would promptly go off any tax rolls? [969]

(Testimony of Charles B. Shattuck)

Mr. Landrum: Just a moment, your Honor. That is predicated on something which happened subsequent to December 23, 1944, and we took the property on that day, your Honor.

The Court: I think so. The right to terminate is as of that date.

Mr. John M. Martin: I only seek to show, if your Honor please, the question of future taxes. The lease clearly states we shall pay taxes, insurance, maintenance and upkeep, and I want to know whether, in arriving at his opinion he took into consideration as to whether the lessee would have to furnish the maintenance, the machinery upkeep, the watchmen and taxes, or whether he understands under the lease that those obligations then would become the burden of the United States government, in the event it exercised its rights of prior use.

The Court: You mean during the operative period of the lease, or during a subsequent period?

Mr. John M. Martin: I am assuming they may exercise the right of priority on December 23, 1944, and had continued in possession of the yard throughout the remaining portion of the lease, and the lease clearly says they are to pay, as lessee, the maintenance, insurance and taxes. I want to know whether the witness understands as to whose obligation it is, in that event.

The Court: I think your question was not clear, Mr. [970] Martin.

Mr. John M. Martin: I appreciate that, if the court please.

The Witness: I feel, counsel, that I already answered that when I said that if the government exercised its right

(Testimony of Charles B. Shattuck)

to priority in the use of those facilities that Tavares would have been out. Naturally, if he was out, he would not have the obligation.

Q. You do not understand that notwithstanding the exercise of the right of priority, that there was a contract obligation here on the part of the government to continue this property in existence as a shipyard, so that it could tender to the lessee, Concrete Ship Constructors, on the expiration of the lease, in accordance with its terms, to-wit, on December 31, 1949, the shipyard and facilities in the condition in which they existed when the government exercised its right of priority, subject only to fair wear and tear of the property?

A. No, I didn't interpret that document as being that kind of an obligation on the United States of America at all.

Q. All right. Then if there is any such obligation, you gave no consideration to it in arriving at your opinion as to value? A. No, not at all, because—

Q. All right. [971]

Mr. Landrum: Let him finish his answer, please.

Q. By Mr. John M. Martin: All right.

A. Actually, not at all, because it is one of those conjectural things that is subject to interpretation. In the market, why, that would just be another reason why a possible purchaser would just shake his head and walk away from it.

Q. Did you take into consideration, in arriving at the value of this leasehold estate, the question as to whether the acquisition cost of the site, the lands here, in the event the option was exercised on January 1, 1950, would in-

(Testimony of Charles B. Shattuck)

clude any interest on the acquisition cost during the ensuing period of years up to January 1, 1950?

A. It was provided that the option price, assuming the option came into being, was to be fixed at the actual cost, acquisition cost of the site, plus the acquisition cost of machinery and facilities, and so forth, less the depreciation as set up in paragraph (b) of paragraph 15 of the lease.

Q. That is correct. Now, what I am specifically inquiring about is whether you took into consideration any obligation on the part of the lessee, in the event he exercised his option to purchase, to pay any interest to the government on the acquisition cost of the site, the 100 acres of land upon which the shipyard was located?

A. I would have to check that lease document to make [972] sure of that, of whether they were to pay interest on the land cost.

Q. To refresh your recollection, I direct your attention to paragraph 31 of the Fifth Amendment, which was executed one day subsequent to the commencement of this condemnation suit, on the 11th day of November, 1942.

A. Pardon me?

Q. Paragraph 31, and I think it is the fifth page from the end of Exhibit W, which states:

"Lessee agrees that when Defense Corporation shall have acquired title to that part of the Site now being condemned by the Government, the Agreement of Lease, dated December 27, 1941, as amended, shall be further amended so as to provide for an increase in the maximum amount of expenditures to be made by Defense Corporation in the amount of the cost thereof to Defense Corporation (which amount

(Testimony of Charles B. Shattuck)

shall not exceed the cost thereof to the Government), and an increase in the amount of rental to be paid by Lessee under said Agreement of Lease, as amended, in an amount sufficient to cover the cost of such part of the Site. Lessee further agrees that in the event the property leased to Lessee under said Agreement of Lease, as amended, should be transferred to another branch of the [973] Government pursuant to paragraph TWENTY-SIX thereof prior to the acquisition by Defense Corporation of title to that part of the Site now being condemned by the Government, Lessee will, if it should thereafter elect to exercise the option to purchase conferred by paragraph FIFTEEN of said Agreement of Lease, as amended, pay to the Government the cost to it of such part of the Site on the same basis as if such cost had been part of the cost to Defense Corporation of the property leased to Lessee under said Agreement of Lease, as amended."

Now, can you state whether or not there would have been added any interest to the acquisition cost of the land, in determining the option price?

A. In my opinion, there would have been four per cent interest added to it.

Q. Upon what do you base that opinion?

A. On Section (a) of paragraph 15, where it provided two bases for estimating; in other words, you would have to go back and calculate which of those two bases would then apply, not knowing what the price of the land was going to be, because you have to determine whichever one is the greater.

(Testimony of Charles B. Shattuck)

Q. But do you understand the option price would be determined under any conditions by taking a combination of [974] (a) and (b), or must it be determined under either (a) or (b), whichever is the higher?

A. It must be determined under either (a) or (b), whichever is the higher.

Q. Where do you find any interest provision in option price (b)?

A. There is none in option price (b), but the point I am trying to make, counsel, is this, that the document itself, with reference to the machinery and the facilities in that paragraph, you just read reference to it being on the same basis as upon which the property was leased on the lessee, provided that the government was first to get back all of its cost, plus four per cent, and that as an offset against that cost, plus four per cent, the lessee was permitted to credit the rent he paid, plus four per cent from the date he paid his rent, and that when those two figures equaled each other, one wiping out the other, then the option came under paragraph (b) and under paragraph (b) the only thing they would have would be the actual cost of the site with the interest, plus the actual cost of the machinery and facilities, less the stipulated rates of depreciation.

Q. Well, am I now to understand that all the testimony you have given as to value of the option price had to do with formula (b) for determining the option price?

A. That is correct, because, in my opinion, that is the [975] one that will operate, because on about November the 5th, or October 5, 1944, the Tavares Construction Company apparently had settled on the question of the rent and interest, or approximately so; or it seems there might

(Testimony of Charles B. Shattuck)

have been some small balance, which I assume has since been adjusted.

Q. In other words, the total cost on the question of this machinery and facilities had, as of October 5, 1944, been fully repaid to the government, including interest on those amounts?

A. Yes, in the form of rent, which was paid as ships were completed for the government.

Q. That is correct. Now, so that you may clearly understand what I am trying to ascertain: is there, as you understand the option price under formula (b) any provision whatsoever for obligating Concrete Ship Constructors to pay any interest on the acquisition cost of the site of these lands, in the event the option was not exercised until December 31, 1949?

A. Based upon your assumptions, I would say that apparently there is no obligation to pay interest.

Q. At least no interest other than whatever might be allowed by this court to the landowners as a part of their compensation?

A. That, naturally, would be a part of the acquisition cost. [976]

Q. We are not apart on that? A. No.

Q. The acquisition cost would include interest as determined by any ultimate award, as made in this action?

A. That is correct.

Q. But what I am asking you is this: when that is determined in this case there will be no interest added for the succeeding period down to December 31, 1950?

A. I think not.

(Testimony of Charles B. Shattuck)

Q. Had you that thought in mind when you reached your opinion as to values, herein expressed?

A. No, I don't think I had that exact thought in mind, because, as I said before, I didn't make a calculation as to what the option price might be in 1950. I made a calculation as to what I thought it possibly would have been on the date of taking, which was December 23, 1944.

Q. All right.

A. And, as I said before, even though I had made the calculation which you have asked about, I gave here just a few moments ago the reason why I thought it still would not alter my opinion that this lease coupled with an option had a market value of nothing.

Q. If that is true, why didn't the United States government, in your opinion, simply serve a notice, a ten-day notice on December 23, 1944, of its intention to terminate [977] this lease on the expiration of 90 days thereafter, if, as you understand this lease, all of the rights of Concrete Ship Constructors would have expired and the option would have expired, and then the United States government would be at no expense and the condemnation suit would have been unnecessary.

Mr. Landrum: Just a moment. If the court please, I certainly am going to object to that, that the condemnation suit would be unnecessary. The condemnation suit would still be necessary.

The Court: Yes, it constituted a cloud on the title that would have to be removed. Regardless of its value, it would be a cloud on the title, just like a cloud on any other title. It may have a value, or it may not, and the jury is here to fix it, but so far as the legal aspect is concerned, there would be a cloud that, in order to get a fee

(Testimony of Charles B. Shattuck)

simple title unencumbered or uninfluenced by outstanding obligations, it would be necessary to remove.

Q. By Mr. John M. Martin: At least, as you understand this agreement, Mr. Shattuck, the service by the government under date of December 23, 1944 of a 10-day notice of the government's intention to terminate this lease, would have upon the expiration of 90 days thereafter have left the lessee with no rights under the contract?

A. Providing it elected to use it for itself, or for [978] others, needed it for itself or for others, I think that is right, although I think they would probably have had to clear it up in court because everybody is entitled to his day in court.

Q. I have passed from the question of priority. I am going to the right of either party to terminate the lease by serving a 10-day notice of its intention so to do, and let's assume that the government had served a 10-day notice on December 23, 1944 of its intention to terminate this lease as of January 2, 1945, and that there had expired the full option period of 90 days subsequent to January 2, 1945. Then, in your opinion, would the lessee, Concrete Ship Constructors, have had any rights under this lease?

A. Yes, they had a right for a period of 90 days, providing it was lawful for the Defense Plant Corporation to do so, and apparently there was some question whether that was lawful, but providing it was lawful, they had the right to have submitted to them by the Defense Plant Corporation the price which the Defense Plant Corporation had received in the form of bids on any items of

(Testimony of Charles B. Shattuck)

equipment, and they had the first refusal to purchase at that price.

Q. In other words, the opportunity to look over the other fellow's shoulder and see what he has bid, and for a period of 30 days thereafter to determine whether they, as lessees, wanted to purchase that part of the property or lease, [979] that part of the premises of the shipyard, at the price which the other bidder had made.

A. Well, I would answer yes, but I doubt that question of the lease, that it is included there. In other words, it referred to the machinery, the sale of the machinery and facilities, and nothing said about lease.

Q. You don't understand from this agreement they had a right to negotiate for the lease of a part or all of these facilities?

A. Oh, they probably had the right to negotiate. Almost anybody has the right to negotiate. You don't have to have an agreement to have that conferred on you. But that agreement for that period of 90 days, after the expiration of 90 days merely said that if it was lawful for the Defense Plant Corporation, that it would grant to the Tavares Construction Company the first refusal, you might say, of the purchase price on any bid price it received for any portion of the machinery or facilities, so they could either meet it or not, as they might elect to do, and in the way you may put it, they were looking over the other fellow's shoulder.

The Court: I think we will take our recess now, ladies and gentlemen. Remember the admonition.

(A short recess was taken.) [980]

(Testimony of Charles B. Shattuck)

The Court: All present. Proceed.

Q. By Mr. John M. Martin: Mr. Shattuck, in direct examination, you testified, in substance, that, in your opinion, an estimated sale price which a prospective purchaser might be willing to pay for this shipyard would have been \$1,985,000 or approximately that amount. Will you tell us what portion of that \$1,985,000 you included as the prospective sale price of the site itself, the land as distinguished from the facilities and machinery?

A. \$720,000.

Q. That \$720,000 was a prospective sale price of the land as of what date of sale?

A. As of December 23, 1944, and that was for the land as fully improved, after the government had spent \$468,752 on it in installing dredges, roads, grading, bulkheads, spur tracks, sewers, telephone lines, water and air lines and power and light.

Q. And was, of course, after the government had spent any other sums that might have been spent in connection with the development of this project, we will say prior to the date the option was exercised?

A. These sums which I have just enumerated here are all included in Exhibit Q.

Q. Oh, I see. In other words, there are certain items, that are shown in Exhibit Q, which actually were improvements, which the government made to raw land, in order to create a [981] completed, developed, useable piece of harbor land?

They included all of the improvements to the site, and the land itself? A. That is right.

(Testimony of Charles B. Shattuck)

Q. Down to December 23, 1944?

A. That is right. In other words, you asked me what I would assign to the site on December 23, 1944. On that date I am looking at that site as an improved piece of ground, that was improved by money spent by the government, which changed the value of that site, because, if one were to move the shipyard entirely off of there, there are certain moneys for improvements which the government expended on the land which wouldn't be moved. They would remain there as a part of that site, regardless of the use to be made of the land.

Q. That \$720,000 was the amount which you estimated a prospective purchaser might be willing to pay, if such site is improved, as of a sale as of December 23, 1944?

A. Well, it might be answered yes in this way. Assuming that all of the machinery and other shipyard facilities and so forth and the batching plant and all of that were moved off, and assuming that the wet docks had been filled and the land was there as a piece of harbor land on that date, improved as the government had improved it with the grading and the sewers and the lights and water and gas, these im- [982] provements I have mentioned, and dredging of Area A, why that would have, in my opinion, been the value of that improved piece of harbor ground.

Q. That, of necessity, assumes, as I understand you, Mr. Shattuck, a sale of the site to a prospective purchaser who would have no use for any of the four graving docks or wet docks?

A. In my opinion, those were good only for war time operation. They are too small to take in an ordinary

(Testimony of Charles B. Shattuck)

large sized ship. They can just handle small vessels in there and I think it is just money lost for anything except the particular operation for which they were created.

Q. You have not included in the prospective sale price anything for either of those four basins?

A. In my total of \$1,985,000, in considering the equipment and so forth, I left in that the best of the four. I left one of them that it was possible that someone might find a use for, one of them, during peace time economy here in San Diego.

Q. But at least three of them were completely excluded from consideration in arriving at a prospective sale price?

A. My judgment would be that any informed purchaser would completely discount at least three of those docks.

Q. In your figures did you leave intact the graving [983] dock built with timbers, where the evidence shows it would have a life of 10 to 15 years, or did you leave intact the graving dock built with steel sheeting, which had a life of 30 to 40 years?

A. I left in my calculation the one which had the longer life, which was the better dock.

Q. The wet dock would be No. 3 or No. 4?

A. That is right.

Q. In arriving at that prospective sale price of \$720,000 for the land, did you include any amount in dollars due to any element of increase in market value in the land subsequent to November 10, 1942?

A. In forming my judgment, yes, in this manner, that I am fully aware of the existing leases on other developed and improved harbor land in the City of San Diego, and

(Testimony of Charles B. Shattuck)

I have an opinion as to what the rental value would be of this improved and developed site. And considering this particular harbor land in the light of what I know about other harbor lands in and about San Diego, as well as in the Long Beach and Los Angeles Harbors, it is my opinion that that figure which I set of \$720,000 was a reasonable and most likely market value for the improved site on December 23, 1944.

Q. Have you included any element of increase in value of the land for the period from November 10, 1942, to December 23, 1944?

A. My answer to that was yes. [984]

Q. How much in dollars?

A. Well, I don't know that I can measure it in dollars. In other words, this land, that was undeveloped harbor land in 1942, was worth \$251,000 and in the meantime large sums of money had been expended, and, in my opinion, the general increase in real estate prices which occurred was sufficient together with the expenditures that had been made to warrant my saying that, in 1944, in December, this land had a value, as improved, of \$720,000. Now, generally, I would say that the probable increase in the market price of real estate—it is pretty difficult when you use general terms of this kind because, when you get down on different pieces, sometimes it is different, but, generally, I would say that the increase in price would not have exceeded say 40 per cent. But here we have a problem where you had a piece of raw land that, during that interim between 1942 and 1944, had very large sums of money spent on it, which completely changed its character. So that it is hard to say what the increase was because you would have one class of one

(Testimony of Charles B. Shattuck)

thing, a raw, undeveloped thing to commence with, and they would have that I am talking about in 1944, this more or less completed improved piece of harbor land.

Q. Were you present when Mr. Cotton testified?

A. I was here a portion of the time when he was testifying; yes. [985]

Q. Directing your attention to page 829 of the transcript, where he was asked the question, "There was a very material change in values between 1942 and 1944, was there not?"

A. "There was; yes," is that in accordance with your opinion?

Mr. Landrum: That is objected to, if the court please, first, upon the ground and for the reason it is setting one witness up against another.

The Court: I think so. It is a comparison of testimony that is not proper except in summation you may argue those matters to the jury. Don't ask one witness to compare his testimony with another. Otherwise, there is no use of having the jury here. That is their function.

Q. By Mr. John M. Martin: I do understand that you made no calculation as to any increase in value for the land itself for the period subsequent to December 23, 1944 and up until December 31, 1949?

A. No; I made no estimate as to what the value of this land might be in 1949.

Q. You have formed no opinion as to what the fair market value of this land might be as of January 1, 1950?

A. No; I have not formed any opinion in that regard. In other words, to me that would be a highly speculative thing to try to do. [986]

(Testimony of Charles B. Shattuck)

Q. In values generally, where they are determined by experts equally well qualified and equally well informed, there may reasonably exist a substantial difference in opinion, is that not true?

A. Well, I would like to—or I believe I will answer that question no for the reason that you qualified it by saying they were equally well informed and equally well qualified. I think, if two appraisers are equally well informed and equally well qualified from the standpoint of experience and background, and they each made the same careful study, there shouldn't be any too great difference in their conclusions.

Q. You include in that, do you not, Mr. Shattuck, an equal opportunity to observe and study?

A. Well, naturally, they would have an equal opportunity. In other words, if a man's background and experience is such that he has not had the opportunity to observe what happens under certain conditions, why then his opinion might not be as good as one who had that opportunity.

Q. Did you have an opportunity, Mr. Shattuck, to observe the condition in which these facilities and utilities existed as of December 23, 1944?

A. No; I didn't see them on that date but I did have the asset property record of the Defense Plant Corporation and I did talk with Mr. Boyer and with others on the ground there [987] who were somewhat familiar with this equipment.

(Testimony of Charles B. Shattuck)

Q. But you have no personal knowledge as to the state or condition of repair these facilities were in or as to their usual condition as of December 23, 1944?

A. I have a statement from the Defense Plant Corporation, which I assume is the same one which the Tavares Construction Company has, in which they are classified as to what their condition was at that time.

Q. You spoke a while ago about the shipyards being worn out. Did you know, when you reached your opinion as to the fair market value of this lease and option, that the shipyard was not actually completed and these facilities were not finished as to construction until along in March of 1943?

A. Yes; I think that I was aware of the fact that this was comparatively and recently completed.

Q. When you stated that they had been used three years prior to December 23, 1944, it is only a small portion of them could have been used, isn't that correct?

A. Well, a good deal of that equipment was second-hand when they went in there. They were just using everything they could lay their hands on and it wasn't brand new when it went in there.

Q. But you personally have no knowledge or observation as to the condition of these facilities or machinery as of December 23, 1944? [988]

A. Other than from the records and from the fact that the investigation revealed that that yard had operated at full tilt. And, when you operate machinery of this kind at full tilt, that means extraordinary heavy wear and tear and they give up their value very rapidly.

Q. In my question I asked you, from your personal observation of the facilities and machinery, did you ever

(Testimony of Charles B. Shattuck)

at any time see either the facilities or the machinery here in operation as a shipyard?

A. Yes; I did. I was down there in 1943 on this property.

Q. You would say approximately a year prior to December 23, 1944?

A. I don't know that I can say exactly. I do know I went down there one day with, I believe it was Mr. Kemmerer, if I remember right, but just when it was—to the best of my recollection, it would be some time during the year 1943.

Q. Did you on that occasion go there for the purpose of apprising yourself as to the condition, the useable condition or state of repair, of the facilities and machinery?

A. No; I did not.

Q. You went there for some other purpose, I take it?

A. That is right. I went out there because there was some question in Mr. Kemmerer's mind. He was doing some work in connection with evaluation of land in that area. [989]

Q. You have spoken about there being approximately \$25,000 difference in your figure in computing the option price as to the facilities and machinery from the figure stated in Exhibit Q. Was your figure of \$25,000 more or less?

A. Well, my figure—you say was it more or less. It would depend on how you figured it. In other words, in making your estimate, or the Tavares estimate, they deducted depreciation on service charges and there were some items of that character that, in my opinion, were not subject to depreciation. In other words, I don't know just how you would depreciate them.

(Testimony of Charles B. Shattuck)

Q. In other words, as to the element of service charges, if it includes salaries to officers of the Concrete Ship Constructors, there would be no depreciation?

A. I don't know how you would depreciate that.

Q. Would that not become unimportant if the entire amount incurred as costs by the government had, under date of October 5, 1944, been fully repaid to the government, with interest?

A. Well, I suppose, as far as figuring this matter of valuation, it might become unimportant. But the point that I see from the standpoint of considering the question of the value of this lease and option is that my estimate, regardless of whether it was high or low, was so close to the estimate [990] that the Tavares Construction Company made as to what that depreciated cost was on that date there was no use of hardly discussing it. It was too close. The margin of error was too small.

Q. Was it an error or was that a matter of classification?

A. That is right; it was a matter of classification. They charged depreciation against service costs, where I didn't. So that made some difference. And there were some classifications of one or two other items. So that, where you are that close together, you had just as well agree, so that there is no room for misunderstanding.

Q. As a matter of fact, if there were any sum of money paid officers of Concrete Ship Constructors, would

(Testimony of Charles B. Shattuck)

that not increase the option price at which Concrete Ship Constructors could purchase this property? In other words, wouldn't they have to pay it twice, first, in rentals to the government and, second, wouldn't it increase the option price and wouldn't they have to pay it a second time if they elected to exercise their option?

A. Well, if they paid the officers of the Tavares Construction Company any salaries, that would be part of the cost of the facilities and the machinery and the site, that is, of the entire lay-out.

Q. That is correct. [991]

A. And, therefore, it would have to be figured perhaps in the figuring of the option price in the end, but, whether they were paying for it twice or not, I doubt it because it was government money that was being paid for it in the first place, and, if they took salaries under the contract, the contract specifically provided that they shouldn't be paid any salaries.

Q. In other words, any error to exercise their option in that respect would be a disadvantage to Concrete Ship Constructors, would it not, first, by increasing the amount of rentals they would have to repay the Defense Corporation and, second, by increasing the option price?

A. I suppose, on your statement, that that might be true. However, the fact that they had had the salaries in the meantime might be of benefit to them.

Q. In the interest of shortening this cross examination, I will ask you, Mr. Shattuck, have you pointed out

(Testimony of Charles B. Shattuck)

to me the most disadvantageous provision that you have been able to find in this lease and option contract, or have I picked upon some of the minor points?

A. I think we have gone over it pretty thoroughly. I think the most disadvantageous point of the whole thing is that it is so confusing there, the whole thing, that no business man would be able to calculate what he should pay for it and, therefore, he would not pay anything for it.

Q. And you, as [992] a broker, wouldn't have been able to explain the contract rights to a prospective purchaser?

A. We have tried to do as well as I have tried to do here today. Whether I have succeeded or not, I don't know. To me the lease, coupled with an option—there are so many ifs, ands and buts about it, that it is just a conjecture, and I don't believe in the open market, where you have a lease coupled with an option such as this, it would be anything or would command anything other than nothing.

Mr. John M. Martin: That is all.

Mr. Landrum: Is there any further cross examination of Mr. Shattuck by any of you gentlemen?

Mr. Monroe: I can't think of anything else.

Mr. Landrum: All right, Mr. Shattuck; that is all.

Mr. Mason.

TOM MASON,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Tom Mason.

Direct-Examination,

By Mr. Landrum:

Q. Where do you live, Mr. Mason?

A. 916 North Edgemont, Los Angeles.

Q. How long have you lived in Los Angeles? [993]

A. Since 1911.

Q. How old a man are you?

A. I will be 55 in March.

Q. What is your business?

A. Realtor and appraiser.

Q. How long have you been engaged in the real estate and appraisal business? A. Since June, 1923.

Q. Will you sketch briefly for the court and jury your experience in the real estate and appraisal business, with particular relationship, Mr. Mason, to your work in connection with harbor lands and properties?

A. Prior to entering in the real estate business in June, 1923, I was in charge of all rail operations in the Wilmington section of Los Angeles Harbor, for a period of five years, and my duties in connection with that work were supplying rail cars for the various steamship companies unloading freight at the docks. I had to have a knowledge of the assembling and discharging of cargo and the docking of ships and things of that kind that appertain to a port. Since I entered the real estate business, I have bought and sold property for myself and

(Testimony of Tom Mason)

others in the harbor area. I have appraised property in the Los Angeles Harbor and the Long Beach Harbor area and, as a matter of fact, the territory in which I have mostly appraised property is from San [994] Francisco on the north to San Bernardino on the east, San Diego on the south and Avalon on the west, among the harbor properties that I have appraised, I have appraised the entire holdings of the Los Angeles Harbor, some 2500 acres of harbor land, on the ship water channels, and I have appraised all of the Long Beach Harbor on three different occasions, that is, the privately owned lands in Long Beach and some of the municipally owned lands in Long Beach Harbor. I have appraised the right-of-way of the Union Pacific into the Los Angeles Harbor and have purchased and acquired the right-of-way subsequent to the appraisal thereof. I appraised all of the Santa Fe Railway holdings in the Wilmington section of Los Angeles Harbor. I have appraised the right-of-way acquired by the Harbor Belt Line in their extension through the Consolidated Lumber Company's fee, that owned harbor frontage and the leasehold of the Consolidated Lumber Company on the adjacent property, and the leasehold of the Patton-Blinn Lumber Company and the Pacific Redwood Lumber Company. I have appraised the leaseholds of the Hammond Lumber Company on three different occasions for tax actions, and that is their leasehold of the harbor property at Los Angeles Harbor, and the San Pedro Lumber Company, the Consolidated Lumber Company and the Patton-Blinn Lumber Company. I have appraised the site acquired by the Harbor Department of the City of Los Angeles in adding additional area for the site of the Con- [995] solidated

(Testimony of Tom Mason)

Shipbuilding Company into the Wilmington section of the Los Angeles Harbor. I appraised the right-of-way acquired by the Maritime Commission in constructing a railroad into the California Shipyard on Terminal Island for the serving [995a] of the employees, taking them to and from the job. I appraised the right-of-way acquired for the construction of a passageway, an overhead over the Patton-Blinn Lumber Company's property to bring the workers for the Calship to the ferry landing to escort them across the bay. I appraised the property of the Union Pacific located on the south side of Cerritos Channel in Los Angeles Harbor, several parcels in there, one particularly of 40 acres adjacent to the draw bridge that crosses the channel at the easterly end of Los Angeles Harbor and the westerly end of the Long Beach Harbor. I have appraised a number of properties belonging to the Union Pacific in Long Beach Harbor. I appraised all of the properties of the Pacific Dock and Terminal Company, who at one time acquired all of the privately owned property in the Long Beach Harbor. I appraised a number of pieces of privately owned water frontage in Long Beach Harbor, that was acquired by the City of Long Beach for enlarging their municipal harbor, both lands and improvements and developments in the harbor area. I appraised the property referred to by one of the other witnesses as the Spanish Bight on Coronado Island. I appraised a piece of property adjacent to the subject property on the south. Briefly, that covers the harbor appraisals.

Q. Mr. Mason, I am just a little interested in your last statement you made that you appraised a piece of

(Testimony of Tom Mason)

property adjoining the subject property on the south.  
[996]

A. That is correct, sir.

Q. When did you do that?

A. I was authorized to make the appraisal a little over a year ago and made an inspection at that time, and had an illness and didn't get around to finish it until recently. That is the property that the Navy has acquired southerly of the property under condemnation in this action.

Q. The studies that you undertook here for us, Mr. Mason, have to do with a date, December 23, 1944. Do you understand that? A. I do.

Q. I want you to tell this court and jury how close to that actual date, if at all, you were personally upon the property with which we are here concerned?

A. The closest date to December 23, 1944, that I was on the subject property was January 16, 1945, in company with Lieutenant Platz of the Navy, in the land section, who made an inspection of this property at the time for the purpose of making an appraisal of it. Prior to that time, in the early 20's, I was on the property once or twice when a number of the retired Navy ships were at anchor in the Bay.

Q. I am also interested to know whether it so happens that, when you were on there in January, 1945, you took some pictures of some physical objects upon this property.

A. I did not; no. In fact, I never did. [997]

Q. Now, Mr. Mason, there is a little question in this case about private ownership of tidelands. You have

(Testimony of Tom Mason)

been here and heard the evidence in the case rather fully, have you not?

A. I have been here most of the time; yes.

Q. Do you know what counsel is driving at and these other witnesses when they are talking about private ownership of tidelands?

A. I think I have an idea; yes.

Q. Do you know of any tidelands in the State of California, as described and defined by counsel, which are privately owned? A. Yes.

Q. Tell us what they are.

A. Tidelands, as I understand it, described so far in this case, are lands that extend from the established mean high tide line seaward or to the water of that line. In this particular connection the tidelands rest between the mean high tide line as established and the pierhead line as established by the Army Engineers. In the Los Angeles area they adjudicated the high tide line due to the fact that there were meandering sloughs around there in the early days when they used the harbor, and they established the pierhead and bulkhead line, some of which were coincident with each other and others being separated by 60 feet or so. A number of properties that were referred to earlier, for instance, the [998] Banning property in the west end of the West Basin—that is one piece of property that comes within that description of tidelands that are in private ownership. And there were two pieces of property adjoining that, owned by Lucy Rice Banning, that were acquired by the City of Los Angeles in 1923, that were tidelands. And there was a tideland piece on

(Testimony of Tom Mason)

Mormon Island that was acquired by the Pacific Coast Borax, and they built a big plant on that and it is still in there. On the westerly end of Mormon Island the Banning Estate, and when I mention the Banning Estate, I refer to the Bannings who came to the Harbor in the early days and founded the town of Wilmington, owns a considerable area there. In the East Basin of Los Angeles Harbor the Union Pacific Railway owns at one point about two triangular pieces of about 10 or 15 acres each, on both sides of the Cerritos Channel. On the channel that runs from Long Beach to Los Angeles Harbor the Union Pacific owns land aggregating something in excess of 1,000 acres. As we approach the Long Beach Harbor, the Los Angeles Dock & Terminal Company owned practically all of Long Beach Harbor at one time. A portion of it has been acquired from time to time by the City of Long Beach for the development of their municipal harbor. They sold their holdings to the Los Angeles Dock & Terminal Company, who, in turn, disposed of practically all of their holdings, with the exception of one piece of 100 acres, at the north side of [999] Cerritos Channel and the northerly side of Channel 3 in the Long Beach Harbor, which they acquired in 1923 and still are in possession of. The Southern Pacific owns the land that fronts on Channel No. 3 and, Channel No. 2 in Long Beach Harbor, and that turning basin originally approximated 49 acres, of which they sold off some 17 or 18 acres to the Los Angeles Soap Company or, rather, to Proctor & Gamble, who have constructed a plant on there. And there are a number of smaller pieces in the Long Beach area that come within the definition of tide-lands as described in this action.

(Testimony of Tom Mason)

Q. Now, Mr. Mason, will you tell us just briefly what you did to make an investigation to prepare yourself to come into this court room to testify in this case?

A. As I stated, prior to my inspection of the property on January 16, 1945, I had become generally familiar with it in my many trips to San Diego Harbor. I secured a map of the property and I determined or estimated its size and obtained information that would allow me to calculate the areas of both the upland and the areaway between the pierhead and the bulkhead line. I ascertained whether or not the subject property was zoned through talking to the City Clerk of National City and the engineer, Mr. Ireland. I secured photostatic copies of the invoices covering the properties, that were acquired, machinery and material and labor and so forth, that [1000] went into the construction of this shipyard. I secured a copy of the lease known as Plancor 401 and studied and analyzed it. I had copies of various communications between the Tavares Construction Company and the Concrete Ship Constructors and the Reconstruction Finance Corporation, the Defense Plant Corporation, the Maritime Commission and the Navy. I secured information as to what properties were leased in the San Diego Harbor area for and the rentals being paid for those leases. Briefly, I believe that covers my investigation.

Q. Now, for what purpose were you making this investigation? What were you going to do?

A. The investigation was made for the purpose of assisting me in forming an opinion as to the value of the lease, coupled with the option, as contained in Plancor 401, or the lease between the government and the Tavares Construction Company.

(Testimony of Tom Mason)

Q. And what do you understand to be the definition of the term "market value"?

A. My understanding of the definition of "market value" is a sum of money a piece of property would bring if exposed in the open market for sale, allowing a reasonable time to consummate a deal; that the deal was made between a willing buyer and a willing seller, and neither compelled to act, and both being well informed as to all of the benefits as well as anything that might detract from the property. [1001]

Q. To what factors, then, did you give consideration in arriving at your opinion?

A. I, first, considered the size and shape of the property which is the subject of this action. I considered the improvements constructed there by the Tavares Construction Company as holdings for the government. I considered whether the land had been developed from ordinary overrun tidelands to a harbor site 10 to 12 feet above mean lower low water. I considered its location as to the metropolitan area of San Diego, its location as to the deep water channels and the harbor. And I considered the fact that there was approximately 64½ acres of upland or dry land, that is, land behind the bulkhead line that had been filled; that there were some 35¾ acres of land that were submerged or which were under water. I considered the fact that, prior to the occupation by the shipyard people, the subject property had been filled from dredgings from the main channel of San Diego Harbor. I considered the fact that the San Francisco Bridge Company had dredged a portion of what has been referred to as Parcel A and constructed a mole pier, of which their Parcel 7 ultimately became a part, or was a part

(Testimony of Tom Mason)

before they made the pier. And I considered the fact that leases for harbor frontage in the San Diego area, up to December, 1904, generally speaking, were leased at the rate of one cent per square foot for the first five years and graduated there- [1002] after during the term of the lease. I considered the fact that, after the Tavares Construction Company started to work on this project, they had dredged the remainder of Parcel A and deposited the spoil on the upland, creating the land as it was in December, 1944. I considered the fact that the subject tidelands were approximately all one piece of tideland near National City that was filled to a mean or elevation of 12 feet above mean lower low water. I considered the fact that there was at least more than a mile of frontage on the landward side of the San Diego Bay that was capable of being developed similar to and comparable to this property. I considered the fact that the Tavares Construction Company were occupying the subject property under an agreement known as Plancor 407, and that it was entered into, I believe, in 1941, December 21st, if I remember the date correctly, or some time around that date. I considered the fact that the subject tidelands were improved with a shipyard for the construction of boats for the U. S. Maritime Commission. I considered the fact that the Tavares Construction Company had agreed to assign to the Defense Plant Corporation or the Commission the lease that they then held on tideland properties, which were a part of this site. I considered the fact that the Defense Plant Corporation had agreed to pay all costs of the construction of this shipyard. [1003]

(Testimony of Tom Mason)

I considered the fact that when completed the Defense Plant Corporation had expended somewhere in the neighborhood of \$2,650,000, after all adjustments had been made, and that that sum, plus interest at four per cent had been paid to them by the Tavares Construction Company as rent.

I considered the fact that paragraph 15 of the option or the lease, Plancor 407, provided that Tavares Construction Company were granted an option under certain terms and conditions.

I considered the fact that this option was granted under the terms of the lease, terminating under paragraph 12 or clause (a) of paragraph 14.

I considered the fact that the lease had never been canceled by either one of these two items.

I considered the fact that the Tavares Construction Company had a lease that was more or less firm until 1947, and automatically extended to 1949.

I considered the fact that this lease was granted for the purpose of constructing boats for the government, and that if any private work was entered into, that rent would have to be paid for it other than the free use they had after the completion of the existing contracts.

I considered the fact that the area between the bulkhead lines and pierhead lines was separated by approximately 1,000 feet, and that no change in these lines or no construction could take place in that area without the permission of the Army Engineers or the Board of Rivers and Harbors; that that area could be used for the construction of wharves, docks, etc., if they secured such permission; and also for the maneuvering of water

(Testimony of Tom Mason)

craft, and tying up of water craft to any dock that might be built.

I considered the fact that between the end of the mole pier and the pierhead line that there was approximately one-half to 15 feet of water in that area, and that area northerly of the mole, extending to the northerly line of parcel A, or parcel A itself, had water that went to a depth of between four and one-half feet to as deep as 21 feet.

I considered the fact that the Tavares Construction Company had the right of refusal of any of the facilities that might be offered for sale within a period of 90 days; after the expiration of the 90-day option period, that they had that right for 30 days, and if nothing was offered for sale within that time, that they did not have any right of refusal.

I considered the fact that we were at war at that time, and that because of the war this shipyard, and many others, were constructed, and that the war was of a nature that shipyards would be in demand until such time as the war might end, regardless of which side might have won it.

I considered the fact that every facility, to my [1005] personal knowledge, on the Pacific Coast at or about the date of the taking under this case in court today, that is, December 23, 1944, that every facility on the Pacific Coast was used in the repair of ships either damaged in action or Merchant Marine ships that were damaged going to and from places in the Pacific.

(Testimony of Tom Mason)

I repeat again that every facility as of that date, to my knowledge, that was available was being used for that purpose, and that, again, was only a temporary situation until the war was over, whether we won or whether we lost it.

Q. Now, did you have any information with relation to the extent of the use that was actually being made by the Tavares Construction Company of these facilities at that date? A. Yes.

Mr. John M. Martin: You are referring now, Mr. Landrum, to December 23, 1944?

Mr. Landrum: Yes, sir.

The Witness: The information I had was one of the letters which was introduced into evidence, showing that the man-hours employed by Tavares Construction Company as of 1943 were 7,000,000 some odd man-hours, and as of 1944, as estimated, was 2,400,000 or 2,500,000, the estimation part being for the last two months of the year and they had the accurate figures for the first ten months of the year, [1006] but made an estimate for the remaining two months.

The Court: I think we will suspend now. Tomorrow morning at 9:30, ladies and gentlemen, and remember the admonition.

(Whereupon, at 4:45 o'clock p. m., Tuesday, February 25, 1947, an adjournment was taken until 9:30 o'clock a. m., Wednesday, February 26, 1947.) [1007]

San Diego, California, Wednesday, February 26, 1947,  
9:30 a. m.

The Court: All present. Proceed.

TOM MASON,

the witness on the stand at the time of adjournment, having been previously duly sworn, resumed the stand and testified further as follows:

Direct-Examination (Resumed)

By Mr. Landrum:

Q. Mr. Mason, I believe when court recessed yesterday afternoon you had discussed with us the question of what you considered in connection with that portion of Exhibit W in so far as it related to the so-called option. Now, will you discuss with us what you considered in connection with Exhibit W in so far as it contained a so-called lease?

A. Exhibit W is the lease between the Defense Plant Corporation and the Tavares Construction Company, Plancor 407, wherein the Tavares Construction Company had a lease on the subject property from the government. I considered the fact that it had this lease and that they were occupying the property in accordance therewith, the fact that they were paying rent for the lease in accordance with the contract, and the fact that this lease was non-assignable without the consent of the various governmental agencies in connection therewith, and the further fact that we were at war and the [1009] necessity for building ships, which was the basis for the establishment of this yard in the first place, and it was not reasonable to assume that such assignment would take place during that time.

(Testimony of Tom Mason)

Q. Did you consider the question of whether or not the Tavares Construction Company, under and by virtue of Exhibit W, might possess this property free of rent from the date of their last payment?

A. Yes; as I stated yesterday, the Tavares Construction Company had the right under this lease, as I interpreted it, to have it free of rent if and only if they were constructing boats for the government. Otherwise, they would have to pay some rent.

Q. Did you have any information with relation to the amount of rent that they might pay should they use these facilities in the construction for private individuals, having previously received the consent of the Defense Plant Corporation and the Maritime Commission?

A. I did; yes, sir.

Q. What did you find with relation to that?

A. I found that the Tavares Construction Company, if engaged in private work, would have to pay rent at the rate of 10 cents per man hour, direct man hour.

Q. Mr. Mason, from your experience in the buying and selling and appraisal of real estate and your own personal [1010] studies and inspection of this property, do you have an opinion with relation to the market value of the rights which the Tavares Construction Company and its associates have in these premises under and by virtue of the contract entered into between them and the government of the United States, on the 27th day of December, 1941? Do you have an opinion?

The Court: What date?

Mr. Landrum: I said under the contract dated December 27, 1941, your Honor.

The Court: Is that 1941?

(Testimony of Tom Mason)

Mr. Landrum: Yes, sir. What I mean is this; their rights arise by virtue of this contract and I stated referring to this contract.

The Court: All right.

Q. By Mr. Landrum: Do you have an opinion?

Mr. Sloane: To which I object unless the date be fixed.

Q. By Mr. Landrum: As of December 23, 1944.

A. I have; yes, sir. [1011]

Q. What is that opinion?

A. My opinion is that the lease coupled with the option has no market value and is worth nothing.

Mr. Landrum: You may cross-examine, gentlemen.

#### Cross-Examination

By Mr. Monroe:

Q. Mr. Mason, are you familiar with this plat here?

A. Somewhat, yes, sir.

Q. I wonder if you would step down here, please, and to make my questions clear, sir, if you would point out to the jury on this plat again where the mean high tide line is.

A. The mean high tide line is approximately up in this area here (indicating).

Q. That is, you are pointing—

A. I am pointing to what would be the westerly—wait. That is north, isn't it?

Q. Well, let us say up by the railroad tracks?

A. The landward side, up by the Santa Fe Railway.

Q. And where, if you will point out again, is the bulkhead line?

(Testimony of Tom Mason)

Mr. Landrum: Now, if the court please, I am going to object on the ground and for the reason that this witness has testified to nothing with reference to the claim of the City of National City, and it is not proper cross examination.

The Court: I was wondering what phase, Mr. Monroe, you [1012] would be interested in in his testimony, unless you are examining on behalf of Tavares.

Mr. Monroe: Oh, no. I am not interested in them.

The Court: What phase are you examining on?

Mr. Monroe: I am merely examining on the phase of the matter of privately-owned tidelands.

The Court: You may call him as your own witness.

Mr. Monroe: Oh, no. Thank you. No further questions.

The Court: Gentlemen for the Tavares interests.

Mr. John M. Martin: Pardon me, if the court please?

Q. By Mr. John M. Martin: Mr. Mason, did you hear my cross examination of Mr. Shattuck?

A. I think I heard most of it. I stepped out in the hall during a part of it.

Q. Well, did you hear all of government counsel's direct examination of Mr. Shattuck?

A. I think I did, yes, sir.

Q. In the interests of time, I will ask you if the same questions were put to you as you heard put by government counsel on direct examination to Mr. Shattuck whether your answers would be the same.

Mr. Landrum: That is objected to, if the court please. You cannot set one witness up against the other.

Mr. John M. Martin: I will limit that question.

(Testimony of Tom Mason)

Q. By Mr. John M. Martin: In answering that question, [1013] Mr. Mason, I desire you to limit your answer to merely those questions propounded by government counsel which had to do with Mr. Shattuck's understanding of the lease and option contract.

Mr. Landrum: I make the same objection, if the court please.

The Court: I do not believe that is a proper method to examine an opinion witness. I think the jury might get the wrong impression from such a limitation of the scope of cross examination. If counsel wants to cross-examine these witnesses he should do so, but the witness should not be placed in a category where you, as jurors, will not be able to analyze the testimony of each witness and give to each witness the credit which you individually think each witness is entitled to; and when we consider so-called expert evidence we are getting into the realm of opinion rather than factual deduction, and the opinion which the witness gives is only as strong as the reasons which he assigns for that opinion. You are judges of that fact. The reasons that a witness assigns for an opinion is the criterion for evaluating expert evidence, and that would not be a fair method of presenting it.

I am not now using the term "fair" in the sense that I think that Mr. Martin is not trying to be fair. I have not indicated anything of that type and do not desire to be [1014] understood as indicating anything of that type, but it is not the legal method because it brings into that situation the comparison of one witness against another, which is not the proper method. You are the judges of that, and the only way you can judge it is to hear what the witnesses say and to listen to the opinions which they

(Testimony of Tom Mason)

express, and to analyze the reasons which they give for those opinions, the latter being the principal feature in the case, where it depends upon expert evidence.

Proceed.

Q. By Mr. John M. Martin: Have you, Mr. Mason, a copy of Exhibit W, the lease and option contract, with you on the stand?

A. I have a copy of the original made for me, at my request, in the preparation for this trial.

Mr. John M. Martin: May I hand the witness a copy of Exhibit W?

The Court: Here is one, Mr. Martin.

Q. By Mr. John M. Martin: I hand you a copy of Exhibit W, Mr. Mason. Directing your attention to paragraph 12, Mr. Mason, particularly that portion thereof which states, and I am commencing at the middle of the third line at the top of the page, or, in the interests of clarity I think I had better start right at the very beginning of paragraph 12:

“Subject to termination upon the terms herein-after [1015] in this paragraph Twelve provided, Defense Corporation hereby agrees to sublease the Site and to lease the Facilities and Machinery to be acquired hereunder, and does hereby sublease the Site, and leases the Facilities and Machinery to be acquired hereunder, to Lessee and Lessee does hereby lease and sublease the same from Defense Corporation for a term ending December 31, 1947, which term, upon its expiration, shall be automatically extended, subject to similar termination for an additional period ending December 31, 1949.”

(Testimony of Tom Mason)

When you arrived at the opinion as to market value that you have here expressed as to this lease and option contract, was it your understanding that the two dates mentioned in the portion of paragraph 12 that I have just read were expiration dates within the terms of paragraph 15 of Exhibit W, where it states:

"Upon the expiration or termination of this lease or extension thereof pursuant to paragraph Twelve hereof, or upon cancellation of this lease or extension thereof pursuant to clause (a) of paragraph Fourteen hereof (unless such cancellation shall have been effected because of a violation by Lessee of the contracts referred to in said clause (a), Lessee shall have and is hereby granted, for [1016] a period of ninety days after such termination, expiration, or cancellation (hereinafter referred to as the 'Option Period') the right and option, by written notice to Defense Corporation and to the Maritime Commission, to purchase all but not part of the Site, Facilities and Machinery at the following prices"?

A. If I understand your question correctly, you want to know if I considered whether the word "expiration" in paragraph 15 would be applicable to the dates of 1947 and 1949? [1017]

Q. As given in paragraph Twelve. That is correct.

A. Yes; I assume that, if the Tavares Construction Company were in possession of the property as of 1947 or as of 1949, that that would be a date of termination.

Q. What was your understanding of the contract provision as to that still being the date of termination or date upon which the Tavares Construction Company might elect to exercise its option to purchase in the event the

(Testimony of Tom Mason)

government requested the right to priority use of the facilities and machinery and Tavares Construction Company consented and granted such right of priority use to the government?

A. It is my understanding of that particular phase that the Tavares Construction Company did have an interest to that date but, in my opinion, it was not valuable and was not marketable and, therefore, had no value.

Q. Do you mean that it is your understanding of the lease and option contract that, notwithstanding the request by the government for the right to priority use and the granting of such right, the Tavares Construction Company would have still had a right to elect to purchase all but not part of the site, facilities and machinery, on either January 1, 1948, or January 1, 1950?

A. I stated that they were still in possession. If they were not in possession, if the lease was cancelled by any other means, for example, like in this condemnation action, [1018] it is my opinion they would not have the right to purchase as of 1947 or 1949.

Q. It is your understanding that by this condemnation action all rights of every character are being acquired that the Concrete Ship Constructors might otherwise have exercised under the terms of this lease?

A. It is my understanding that in this condemnation action, as of December 23rd, the government is taking all of the rights, interest and title of the Tavares Construction Company in and to this Plancor 407, as within their power to condemn any property that is necessary. They are taking all of the rights they had and the Tavares Construction Company, if the rights have any value at

(Testimony of Tom Mason)

all, are entitled to compensation and, if they have not, they are not entitled to anything.

Q. Is it your understanding that, except for this condemnation action, the granting of priority use by the Tavares Construction Company to the government would have in no manner affected or altered the Tavares Construction Company's right as lessee, the priority rights of the government, that is, the right to assign it to another agency without any action to cancel the lease or condemn their rights in it; that they would still have the right to exercise the option? For example, what I mean is this. In this document the Defense Plant Corporation is a governmental agency and it granted [1019] the lease and holds it. If the Defense Plant Corporation transferred that to the Maritime Commission or the Department of Justice or the Forestry Department or any other department, it would be just like if I own a piece of property and it was leased to you and I sold it to somebody else subject to the lease?

A. That is the way that I view that priority phase of it.

Q. Am I to understand, then, that, if the government exercised its right to the priority use, it is your understanding that the Tavares Construction Company as lessee no longer would possess the right to elect to purchase under the terms of the option?

A. I didn't make that statement; no, sir.

Q. What is your understanding with respect to that situation?

A. My understanding with respect to that situation is that the Tavares Construction Company had the right to purchase under the option until that right was taken

(Testimony of Tom Mason)

away from them either by condemnation, as in this case, at which time they should be compensated for it if it was worth anything, or, if in my opinion, it wasn't worth anything, or if another agency of the government took it over and assumed the responsibilities of the Defense Plant Corporation, they would still have that right until they went a step or two [1020] further.

Q. Assume that the government requested and the Tavares Construction Company as lessee granted the right of priority use to the government, is it your understanding that under the terms of this lease and option contract the Tavares Construction Company would thereby be deprived of the right to immediately serve a 10-day written notice of its intention to elect to terminate the lease and, upon the 11th day, elect to purchase in conformity with the option provisions?

A. I don't understand it that way; no.

Q. What is there in that lease which to you causes a contrary understanding?

A. If I understood your question correctly, you stated if they assigned or consented to the priority. You asked me if I thought that took away from them their right to notify the government that they desired to cancel, in order to exercise their option.

Q. That is it, in substance, Mr. Mason; yes; that is correct.

A. Again repeating what I said a minute ago, if they transfer their rights from the Defense Plant Corporation to another governmental agency, that other governmental agency has to assume the responsibility of the Defense Plant Corporation until some provision came up whereby

(Testimony of Tom Mason)

that was de- [1021] nied them, and Tavares would have the right to cancel under the 10-day notice, as I see it.

Q. But you are confusing in your answer a second question which I have not yet asked you. You are assuming in your answer that the Defense Plant Corporation transferred its rights to another department of the government. Now, in my first question I am omitting any such assumption. We will assume that there was no transfer and that the government merely wanted to use this property, the facilities, as contemplated by the provisions of the lease and it had a right to a priority use, whether it wanted the use for one year or throughout the remaining unexpired portion of the lease; that the government clearly had the right here to notify the Tavares Construction Company that it desired such priority use and, clearly, it was the duty of the Tavares Construction Company then to grant to the government such priority use. What is there in this lease that would negative or preclude the Tavares Construction Company from immediately serving a written 10-day notice of intention to terminate the lease, ending all of its obligations as lessee either as to priority or payment of taxes or maintenance or insurance or anything else, and, on the 11th day after the service of such notice, say to the United States government, "I tender my option price and tender a deed to all but not part of the site, facilities and machinery"? [1022]

A. I answered that a little while ago when I said that it was my opinion that the Tavares Company had that right under the priority paragraph in Fourteen.

Q. Do you think that that right so possessed by the Tavares Construction Company as lessee under this lease

(Testimony of Tom Mason)

and option contract would have been a substantial leverage in its hand as lessee in the event that he procured a purchaser who wanted an assignment of lessee's rights under the lease? By that I mean, if the Tavares Construction Company possessed the right to elect to purchase under those conditions, wouldn't the government know, if it refused to consent to an assignment of the lease, the Tavares Construction Company as trustee could immediately exercise its right to purchase and demand a deed and convey the fee title to its prospective purchaser?

A. I didn't understand that part of your question about the government, if I may have that part again, sir.

Mr. John M. Martin: Will you read the question again, please?

(Question read by reporter.)

Mr. John M. Martin: The question is not clear and I would like to withdraw it and restate it, if the court please.

Q. You have previously testified that, in arriving at the conclusion on your part that the lease and option contract had no market value as of December 23, 1944, you considered the fact the lease could not be assigned by the Tavares Construction Company without the consent of the government. [1023]

I am asking you now if the Tavares Construction Company has the right, in the event the government refused to consent to the assignment to a prospective purchaser of the lease, to immediately serve a 10-day notice of intention to terminate the lease and to elect to purchase the land. Wouldn't the lessee, the Tavares Construction Company, be enabled to carry out a sale of the entire

(Testimony of Tom Mason)

shipyard, whether the government consented and liked it or not?

A. Assuming the situation as you have stated it, yes; if they could find a buyer that would pay the amount of money that Tavares would have to pay in exercising his option, that is, a sum of money that the jury in this action will set up for the value of the land for National City, plus the sum of money that has been stipulated in one of the articles on trial here, \$2,141,000—if he could find a buyer that would pay in excess of that, he could make the sale. Otherwise, he couldn't sell it.

Q. Now, let's move to the second exception which you originally had in mind and that is one where the Defense Plant Corporation sees fit to assign its right, title and interest, to this shipyard to another branch of the government and the government sees fit to exercise the right of priority use, either for its own purposes or for the use of others under the government. Is it your understanding that, under that kind of a situation, the contract here authorizes the government [1024] to dismantle or remove or otherwise destroy the facilities, improvements or machinery, erected thereon, under the terms of this lease, or was there an obligation on the government to maintain them?

A. It is my understanding that there was an obligation on the part of the Tavares Construction Company to maintain the facilities. I read nothing in the contract that would warrant under merely an assignment the right to destroy the property by either party.

Q. So far as you understand this contract, you gather from the contract that it was the contemplation of both the government and the Tavares Construction Company

(Testimony of Tom Mason)

that the shipyard facilities would remain in existence and would not be destroyed by either party, without the consent of the other, until the expiration or termination of the lease in accordance with the terms of the contract?

A. That is true as far as it goes. One other step in that is the acquisition of the rights of either the Tavares Construction Company or the Concrete Ship Constructors by the right of eminent domain or condemnation, and from that point on out I wouldn't pass on what could be done with the facilities.

Q. So that, except for the right of the government to condemn and acquire the lease and option rights, you understand that this contract did contemplate that the facilities, [1025] improvements and machinery, would remain in existence until the lease was either terminated or expired in accordance with its terms?

A. Yes; either terminated, expired, or by some other arrangement that we can't foresee at this time that might come up for the cancelling of it or the acquisition of it by the government. [1026]

Q. Of course, if the lessee violated the terms of the lease, the government had a right to terminate the lease?

A. Well, on any condition specified in the lease whereby it could be terminated, violation, or bankruptcy, or any one of the features that would permit its cancellation, or the lack of the necessity for building ships, either one or both parties could cancel.

Q. What do you find in the lease, Mr. Mason, that gives you the understanding that Tavares Construction Company, as trustee, is to pay taxes, insurances, main-

(Testimony of Tom Mason)

tenance, watchmen, and so forth, during any period of priority use that may be exercised by the government?

A. Without rereading the lease, I don't know if I can quote it, but under my assumptions, as I stated a few moments ago, that the responsibility of maintaining and keeping the plant in condition so long as it remained with the Tavares Construction Company, it would be necessary to do those things in order to protect the property.

Q. Then you have arrived at your opinion as to the fair market value of this lease and option contract, with the understanding on your part that, notwithstanding the government might exercise a priority use, for instance, from December 23, 1944, until January 1, 1950 that all expense of taxes, insurance, maintenance, and so forth, was to be borne by the lessee, Tavares Construction Company? [1027]

Mr. Landrum: That is objected to, if the court please, in that it is indefinite. This contract provides for a priority use of all or some part. Counsel asks this question so that the witness will not understand whether he means a priority of all or only a part.

Mr. John M. Martin: I will divide the question in obedience to counsel's objection and ask the witness, first, to answer the question on the assumption that the government priority is for the entire period and for all of the facilities and machinery.

A. I did not make my valuation on that method. I valued that option under the assumption that it could be exercised, although of the opinion that the option did not exist. Based on the assumption that it could be exercised, I had to assume they had an option in order

(Testimony of Tom Mason)

to place a value on it. It is my opinion that there was no option as of the date of valuation, namely, December 23, 1944, but in order to arrive at a figure I assumed that there was an option, that they did have the right to purchase under the agreement, and, therefore, set out my opinion of what I thought they would have to pay. That is, when I say "what I thought," I mean what I thought might be a reasonable figure for the land, but that figure might be altered one way or another by the jury in this action and who may make it higher or lower than my figure, but whichever way it is, why, it [1028] affects that opinion just that much, plus the agreed sum for the facilities. Then I made an appraisal of the market value of the property, as I saw it as of December 23, 1944, and my opinion of the value was considerably less than the figure that Tavares Construction Company would have to pay for the property.

Mr. John M. Martin: Will you read my question, please?

(The record was read.)

Q. By Mr. John M. Martin: Can you answer that question, Mr. Mason?

A. I think the first statement I made in my answer answers the question, if I am not mistaken.

Q. To make it a little more clear as to just what I am trying to solicit your aid and assistance on in explaining this contract, I direct your attention to paragraph 14 of the lease. At the bottom of the page you will note the subhead:

"or (b) the government shall request priority for itself or others with respect to the use of the facil-

(Testimony of Tom Mason)

ties to be provided hereunder and, Lessee shall fail or refuse to give such priority."

Is it your understanding that that means in that provision that priority may be requested for a portion of the facilities, or must such priority relate to the use by the government with respect to all the facilities to be provided hereunder? [1029]

A. I hadn't given that particular phase of it any thought before, but it might be construed to be all or part. That would possibly be more or less of a—

Q. Let us assume then for the purpose of my next question that we first construe it to mean a priority use to the government for all of the facilities to be provided under the lease, and further assume that such priority use was requested by the government and granted by Tavares Construction Company for the entire period remaining in the lease, or up until January 1, 1950, what then is there in this contract that you understand to mean that, notwithstanding the possession and use under the priority, as exercised by the government throughout the remaining period of the lease, that the Tavares Construction Company, as lessee, is still obligated to pay the taxes, insurance, maintenance, and so forth? Is there any particular portion of the lease that you can direct my attention to which will aid me in arriving at your understanding, Mr. Mason?

A. I don't recall, without going through and reading it, but it is my understanding that the responsibility of maintenance is, as I stated in answer to a similar question a few moments ago, with the Tavares Construction Company as long as they are in possession of the property. Now, if they were not in possession of the property by

(Testimony of Tom Mason)

priority, and still had not been canceled out of the lease, the lease had not [1030] been terminated or taken away from them, I would assume that the agency that was in full charge of the property and the agency that would prevent them from occupying or utilizing any portion of it would be responsible for the equipment thereon, if granted a priority under this contract. But that statement is made with the thought in mind that the Tavares Construction Company would not even be permitted on the property, that the agency would take over the whole property, as I understood counsel's question.

Q. In other words, we both have in mind in the answer and in the question just given, that that is the exercise by the government of a prior use as to all of the shipyard and its facilities, and not just simply as to some small portion of it.

A. That was my understanding of the question, yes.

Q. Very well. Then, Mr. Mason, what is your understanding of this lease and option contract, as to the rights of the lessee, Tavares Construction Company, in the event the government exercised such right of prior use by one of its other governmental departments, and thereupon the government proceeded, without the consent of the Tavares Construction Company, as lessee, to dismantle and remove, or otherwise completely destroy these facilities and machinery.

Mr. Landrum: That is objected to, your Honor please. It is improper cross-examination. They had not done so on [1031] December 23, 1944. If counsel wants to go into all that happened after that, they could not have elected because they are cut off on the 23rd day of December, 1944.

(Testimony of Tom Mason)

Mr. Martin. I am assuming, if the court please,—

The Court: We have to make assumptions in these cases. Otherwise there would not be any way to arrive at a judicial determination of the problem. These assumptions, ladies and gentlemen, are for the purpose of testing the value of the opinion. It does not mean these assumptions are a reality. If they were, they would be testified to as facts. There must be hypothetical assertions in the nature of assumptions in these questions. I think the Supreme Court clearly stated in the Miller case that you have to adopt practical methods, and we have only the implements which are available. We cannot construct situations that do not exist. We have to assume certain things to exist. The purpose of those assumptions is not to establish that they did or did not exist. It is to test the opinion of the witness so that the jury may reach an estimate as to the value which they are going to give it.

OVERRULED.

Mr. John M. Martin: Will you read the question, please?

(The question was read.)

The Witness: And you mean that question to exclude the right of arbitration, and so forth, as set up?

Q. By Mr. John M. Martin: No, I am not assuming [1032] any thing except an assumed state of facts in that question, and to make it more clear I will add this: We will assume that no condemnation action is filed. You understand that? And I am assuming the government has requested the Tavares Construction Company and they have granted the right of priority use for, we will say, the entire unexpired portion of the lease or until January 1, 1950. Then I want you further to assume that the

(Testimony of Tom Mason)

government or some department should decide that it wanted to dismantle or remove, or otherwise destroy these facilities, so that under my assumed state of facts when the lease expired according to its terms on December 31, 1949, there was nothing remaining in this shipyard excepting the land, the site, as improved. What is your understanding as to whether under the lease and option contract Tavares Construction Company, as lessee, would then have the right to elect to purchase the site at the acquisition cost of such site to the government, excluding from the option price the entire \$2,141,236.49, as calculated in Exhibit Q.

Mr. Landrum: That is objected to, if the court please, in that it excludes or includes within the question propounded the amount of moneys expended by the government of the United States in the making of this very value as to which he is asking now.

The Court: I am inclined to think that vitiates the [1033] question, but I wish you would read the question, please.

Mr. Landrum: May I make the further statement, your Honor please—

The Court: Now, just a moment. Wait until the question is read. It is difficult enough to do it without interruption.

(The question was read.)

The Court: I think the question is proper. Overruled.

The Witness: I don't see how you could exclude the facilities, the price paid for the facilities of \$2,141,236.49 from the price that Tavares Construction Company would have to pay, because the lease specifically says all, the

(Testimony of Tom Mason)

cost to the government of all those things, so that, in my opinion, in 1949 or 1950 Tavares Construction Company would still have to pay the price that the jury in this action puts on the naked land before they had improved it, plus the cost of facilities.

Q. By Mr. John M. Martin: And in testifying as to your opinion as to the fair market value of the lease and option contract as of December 23, 1944, you gave no consideration, as I understand it, to the amount which the option price would be in the event the facilities and machinery were either dismantled and removed or completely destroyed prior to January 1, 1950?

A. No. In my opinion of the price that Tavares [1934] Construction Company would have to pay as of December 23, 1944, I could not conceive the destruction of the facilities by anyone else, and that if he wanted to exercise the option, that that is the sum of money that he would have to pay.

Q. Now, the option price that you have been talking about, as I understand it, is the formula (b) as to price under paragraph 15 of the lease; is that correct?

A. That is correct, yes.

Q. And formula (b) sets forth a schedule of depreciation as to the facilities and machinery?

A. That is correct.

Q. For various classes of facilities; is that your understanding?

A. That is correct. Class 1, five per cent; class 2, ten per cent; and class 3, twenty-five per cent.

Q. Then finally winds up with the provision then under paragraph 3 of formula (b) in paragraph 15, "pro-

(Testimony of Tom Mason)

vided, however, that the minimum residual value on all items shall be 15%”

You understand by that provision just read, however, that the option price as to the facilities and machinery should at least equal the minimum residual value on all items of 15 per cent, notwithstanding the fact that under the assumed state of facts I have just given in my previous question the government, without the consent of the Tavares [1035] Construction Company, might have dismantled and removed, or otherwise destroyed, all of the facilities and machinery.

A. It is my understanding—

Mr. Landrum: If the court please, I object upon the ground and for the reason it is improper cross-examination and an improper statement of the market value. It is an attempt to show damage for violation of the contract.

The Court: Of course, the term used is “just compensation.” The courts have, in interpreting that phrase, used various expressions, “actual value,” “market value,” “just value,” and other expressions which are judicial connotations of that provision of just compensation. I don’t know why we should not enlarge it so as to make it all-inclusive. Objection overruled.

The Witness: It is my understanding that that 15 per cent clause in clause (b) of paragraph 15 is that assuming the shipyard was in operation for 10 or 15 years, and we were at war and the necessity for building ships prevailed during that length of time, and the facilities were used for that length of time, and the option was exercised at that particular time, that they would still have to pay 15 per cent of the cost to the government,

(Testimony of Tom Mason)

even though they had worn out the machinery in the construction of the shipyard, if they desired to exercise the option. In other words, what I am trying to say is that that factor has to do with the [1036] depreciation factors and has nothing to do with any destruction, razing or destroying by any other governmental agency of any part of parcel of the facilities of this shipyard. That is my interpretation of it.

Q. By Mr. John M. Martin: Then am I to understand from your last answer, Mr. Mason, that even though the government, under the exercise of its prior use, had for some reason seen fit to remove, dismantle or destroy these facilities, that the depreciation schedule set forth in paragraph 15, sub-head (b), for determining option price would still be followed?

Mr. Landrum: That is objected to upon the ground and for the reason we are concerned here with December 23, 1944, and what the government might do thereafter is incompetent in this case.

Mr. John M. Martin: It is not offered, if the court please, for the purpose of showing what the government might do thereafter, but merely for the purpose of getting at the witness' understanding of this contract.

The Court: Will you read that question, please?

(The question was read.)

The Court: Overruled.

The Witness: I would say that it would be followed for all of the facilities that were there, and, for example, I have this in mind: they added to this yard and took some [1037] materials away from there, and sold some to other shipbuilding yards during the life of the yard. There were adjustments made. If they took a piece of

(Testimony of Tom Mason)

material away, a piece of machinery away from this yard and took it to another yard, they adjusted their expenditures on this yard by a deduction. If another agency under priority moved in on this property and destroyed or razed or completely demolished every piece of property, there would be an adjustment made, if it would all be eliminated. If some of it was still in existence, they would have to pay for it. There would be an adjustment made. I don't think that Uncle Sam, or anyone else, would do anything else but that, and if they took those gantry cranes that show around those dry docks and moved them up to the California Shipbuilding Company, or up to Seattle, or to some other shipyard, I don't think Tavares Construction Company would be expected to pay for that, if they exercised their option. If the Navy took over one of those cranes, and put it over on the destroyer base, I think there would be an adjustment made for it. What the adjustment would be, I don't know, because it would have to be made as of the time the thing happened. I can't see where if, as counsel stated or included in his question, or tried to include in his question, and we will assume they removed everything, and the government was still occupying the land only under the priority in 1949, or 1950, on December 31st, [1038] and all that was there was the land, then I presume that all Tavares would have to pay would be the market or the cost to the government of the land. I don't see anything different, and I think that is common sense.

Q. By Mr. John M. Martin: I think I understand your answer, Mr. Mason, where you use the illustration, for instance, as to a gantry crane. You are referring to these mechanical derricks or movable derricks indicated on the model? A. Well, I am referring to—

(Testimony of Tom Mason)

Q. But let us take the situation where I am trying to get at and where I have in mind these four graving docks or wet docks, which instead of being portable machinery, have been referred to by some witness as a depression in the land, in the site itself. Let us assume for my next question that, for instance, the government decided during the period of possession by it under its priority use that it wanted to use the areas occupied by graving docks 1, 2 and 3 for some other purpose than a graving dock, and in the accomplishment of that purpose completely removed the graving docks as to sheet piling and material construction, and back-filled them, and left intact, we will assume, only graving dock No. 4.

Now, to be sure that I understand you, let us further assume that a calculation of the option price from Exhibit Q as to these three graving docks 1, 2 and 3 that have been [1039] removed or back-filled,—that there is included in the option price of the facilities and machinery as set forth in Exhibit Q the sum of approximately \$514,286 as the option price as of December 23, 1944, for graving docks 1, 2 and 3. What then would be your understanding in the event Tavares Construction Company exercised its option to purchase, as to how the contract contemplates determining of the option price, with the dry docks 1, 2 and 3 having been removed or back-filled?

A. It is rather difficult to assume a hypothetical situation of that kind, wherein the government would allow the Tavares Construction Company to still be in possession of the option, but assuming that that was the case and the Tavares Construction Company wanted the dry docks, the government would either have to excavate

(Testimony of Tom Mason)

them again, if they filled them, or make some adjustment for the removal of them.

Q. What I am getting at is the understanding under the contract, that there would be a contract obligation in the making of that adjustment to eliminate the entire depreciated value, as calculated in Exhibit Q, for those three graving docks. In other words, would a credit of the exact amount, \$514,000, as set forth in Exhibit Q, be allowable to Tavares Construction Company, as lessee, in the form of a deduction in the amount of \$514,000, approximately, from the total option price for the purchase of these shipyards? [1040]

A I don't think so, for the reason that we are talking about the purchasing of a shipyard in one end of it and a dismantled piece of property in the other. It is hard to reconcile the facts with the hypothetical situation. If you take the cold words of the contract, they have to pay the cost to the government, plus—or, less certain depreciated factors, not exceeding a total depreciation of 85 per cent, or 15 per cent residual, as stated therein. I can't conceive quite that situation actually being, or, I can't answer it as a hypothetical question because it is a little far-stretched, as I would see the operation. If the situation as counsel indicated prevailed, I am satisfied in my own mind that some means or measure would be exercised under the contract where Tavares Construction Company would be out, even to the extent of the action that took place, as exemplified here in this court. His rights would be condemned and he would be cut off before 1950, or 1947, whatever the date is. [1041]

Q. By Mr. John M. Martin: But, except for condemnation or a termination of the lease in conformity

(Testimony of Tom Mason)

with its own terms, is it your understanding of the lease and option contract that both parties, that both the government and the Tavares Construction Company, contemplated by that contract the continued existence, for instance, of these four graving docks I have referred to until the expiration or termination of the lease, in conformity with its terms?

A. I don't quite understand. May I have it again?

(Question read by reporter.)

The Witness: I would say yes; that it was the contemplation of both parties that the shipyard would remain intact until such time as it was terminated or, by agreement, was dissolved or was condemned, as in this action.

Mr. John M. Martin: That is all.

#### Redirect Examination

By Mr. Landrum:

Q. Mr. Mason, counsel has asked you with relation to something which might take place in the year 1950. Will you tell this court and jury the main reason that you reached the conclusion that that paper, Exhibit W, could not be sold for a profit?

Mr. Crouch: I object to that as not proper redirect examination.

The Court: I think he has told us but he may tell it [1042] again. Overruled.

The Witness: To put it as simply as possible, assuming that I, as a broker or as a business opportunity broker, licensed in the State of California, was presented a document of that nature and asked to sell it, or if one of my clients had an opportunity to buy it and came to me about buying it, I would go through the document, as I

(Testimony of Tom Mason)

did in preparing for this case, and point out the many ifs, ands and possibilities of this and that happening. It would, in my opinion, make the possible profit in it for the person who was going to sell the option so speculative because of things he would have to do, following the contract or lease, considering it by its four corners, the provision to pay the cost to the government, which was \$2,141,000, plus a sum for the land of, we will say, \$250,-000, which would make \$2,406,000, or some such sum as that, that he would have to pay if the option was exercised. And in making an analysis of the property and comparing it with shipyards elsewhere, and based on my knowledge of what happened after the last war with the Concrete Ship yard on Mormon Island in Los Angeles Harbor and the Wooden Shipyard on Mormon Island in Los Angeles Harbor, and realizing we were out of war at the moment, it would be entirely too speculative and I can't see where a willing buyer coming in to buy the paper or the option or the assignment of the lease, if it could be assigned, should pay five cents for it. [1043]

Mr. Landrum: That is all.

Recross Examination

By Mr. John M. Martin:

Q. When you say, in your opinion, it is entirely too speculative, do you mean that the element of value would be entirely too speculative or that the element of contract rights as mentioned in the lease and option contract would be too speculative?

A. The element of certain rights coming into being; for example, the right to remain on the property, the right to an option. That was speculative. As evidenced in this

(Testimony of Tom Mason)

court, it was cut off on December 23rd in a condemnation action. There are all of those possibilities in there, that he might be cut off as he was cut off. It was too speculative.

Q. The element of condemnation, as to the right of the sovereign to condemn, is an element that is inherent and exists in every piece of property in the United States of America, is that not correct?

A. There is no question about that. If the necessity requires it, the State, City or County or federal government and certain branches of your local governments may condemn property if the use is for the public.

Q. Would you say, then, that the fact, for instance, by [1044] way of illustration, that the government might desire in time of war to condemn the State House at Sacramento, belonging to the State of California, for government purposes, that the fact that the government might possess such a right would prevent you as an appraiser from arriving at a fair market value of that State House in the event it was to be offered upon the open market for sale by the State of California?

A. No. The fact that it is owned by the State would mean they would condemn it after a proper study, the same as I did in this action.

Q. Then, why isn't it fair to remove the element of speculation as to this lease and option contract to be condemned, when you form your opinion as to the fair market value of the lease and option contract?

A. That is only one of the phases that makes it speculative.

(Testimony of Tom Mason)

Q. What are the others, so that I may understand them?

A. If I was sitting down across the table, with counsel, as a business man, talking about it, we would take the various items, the right that was conveyed to the Tavares Construction Company to negotiate. We would discuss that and find that it was the right to negotiate the same as anybody else has and a right to assign the option or the lease subject to the consent of the government. It might be questionable as to whether he could obtain that. The right to exercise the option coming into being under paragraph Twelve, as of a certain date or at the expiration of the automatic-extended term of the lease, December 31, 1949, in the future. The right of the government to acquire it for other agencies. The right or the possibility of the option coming into existence under paragraph Fourteen. All of those things would throw up a question as to whether it would be a piece of paper that you could market, and then the further thing that you would have to estimate the value of the property as it was of the date that you were negotiating for the paper and, following that, the formula set up, and estimate the market value of it, and, if the market value exceeded the formula that he would have to pay, it might be conceivable that somebody would pay a few cents for it. But, in my opinion and from my analysis of it, the market value was lower than that sum of money. Hence, there was no market value in it.

(Testimony of Tom Mason)

Q. In order that I may be sure that I understand you, when you stated as your opinion that the option had not come into being as of December 23, 1944, will you state just what you mean?

A. I mean that the option had not come into being; that Tavares did not exercise an option on December 23rd or prior thereto, that is, exercise any rights that he might have had to an option prior to the date of valuation herein. [1046] He did not take these steps necessary to give him the option.

Q. Were those rights to take the necessary steps to exercise an option a portion of the rights that were here condemned and which you have included in your valuation?

A. Oh, yes.

Q. So that, if they were acquired by the government in this proceeding, Mr. Tavares would have had no right to exercise them? Is that your understanding?

A. He had no right to exercise the option after December 23rd. Up to the cutting off on December 23rd, he had the right to exercise the option but he did not.

Q. But am I to understand that it is your understanding of this contract that you can include in your opinion as to the fair market value of the lease and option contract nothing whatever for the value of the option for the reason that it had not come into being as of December 23, 1944?

A. It is my understanding of what I did include in my opinion of value that it was all the rights that Tavares had in and to and by virtue of the lease agreement, Plancor 407.

Q. But your understanding of those rights, as I understand your testimony, excluded therefrom any right

(Testimony of Tom Mason)

and notice to terminate as a condition precedent to electing to purchase because, by the very act of condemnation, the lease and option right in toto ceased to exist on December 23, 1944?

A. You misunderstood me or I possibly didn't make my- [1047] self clear. Up to the filing of the action for the taking of the property, this action here, December 23, 1944, the Tavares Construction Company had the right to exercise an option following a certain prescribed rule in this document. When the government stepped in and took that right away from him, even though he didn't exercise it, he is entitled to appear here in court and attempt to get whatever he feels that he is entitled to, and my opinion is that the market value of all of those rights, including the option right, is that it had no market value as of the date of valuation.

Q. What I want to be clear about, it is my understanding that you based that opinion, Mr. Mason, as to value upon your conclusion, from an examination of this contract, that the option right had not come into being or existence as of December 23, 1944, is that correct?

A. No, Mr. Martin. I said that he had the option right but the option itself had not come into being.

Q. What do you mean by that last statement, that the option itself had not come into being? Do you mean for the purpose of your appraisal as to value?

A. No. I mean that Mr. Tavares had not, and, when I say Mr. Tavares, I mean the organization that was in the lease,—that he had not exercised their option and not said to the government, "I am going to take that property in accordance with the option," and the government said, "Okay; [1048] you can take it." He didn't do that up

(Testimony of Tom Mason)

to December 23rd. Up until the government took it, he had the right to do that and he should be paid for that right, which, in my opinion, is nothing.

Q. In other words, as I understand you, you included in your opinion as to value or took into consideration as one of the elements that, the Tavares Construction Company not having elected to purchase or serve a 10-day notice to terminate prior to December 23, 1944, the service by the lessee, the Tavares Construction Company, of notice either to terminate or to elect subsequent to December 23, 1944, would have been an idle and useless act?

A. I think that I answered that, in substance, earlier in my testimony, wherein I stated that I had to assume that the option had come into being, in order to appraise it, and that is what I did. In my appraisal of the option, or lease coupled with the option, I took the position in my own mind that the Tavares Construction Company had gone through the routine of sending a notice of a 10-day cancellation, had exercised the option and had the option in their possession. That is one of the things that I took as a basis of my appraisal of this option.

Q. But did you also take into consideration, Mr. Mason, that, except for termination of this lease and option contract prior to January 1, 1950, the Tavares Construction Com- [1049] pany as lessee would also have had the right to elect to purchase the entire site, facilities and machinery, as of January 1, 1950?

A. I could have placed that interpretation on it but I made no calculation to cover it because it was so far in the distant future, and, knowing what had happened with similar yards after the last war, I couldn't see where anyone would pay anything for the option.

(Testimony of Tom Mason)

Q. In other words, you reached the conclusion that an option to purchase 100 acres of real estate at a time or period fixed five years, we will say, in the future, was the fixing of such a remote period as to make it unworthy of consideration in arriving at a fair opinion as to market value? A. As of the date of valuation; yes.

Q. How, then, do you compare that remoteness with an illustration, for instance, where these tideland leases are leased for a long period of 25 to 50 years, on a graduated rental basis of say from 1 cent per square foot up to 5 cents per square foot?

Mr. Landrum: If the court please, that is objected to as not proper recross examination.

The Court: Sustained.

Q. By Mr. John M. Martin: Do you in your calculation—

The Court: I think I should explain that ruling so that [1050] counsel will not misapprehend the reason for it. The question leaves out of consideration the exhibit which is the basis of calculation.

Mr. John M. Martin: Thank you, your Honor.

Q. In this lease Exhibit W, the lease and option contract, I have understood you to say that you have given full consideration to all of the elements that would enter into the determination, in your opinion, of the fair market value of the lease and option contract?

Mr. Landrum: If your Honor please, I object to that upon the ground and for the reason it is not proper recross examination. He went into all of it on his prior cross examination of this witness. The only question I asked this witness was one question and that was what was his main reason for reaching that conclusion.

(Testimony of Tom Mason)

The Court: I think you went into most of this but you can go into that further after the recess. Ladies and gentlemen, we will take a recess for about five or ten minutes. Remember the admonition.

(Short recess.)

The Court: All present. Proceed.

Mr. John M. Martin: I have finished my recross examination, if the court please.

Mr. Landrum: Nothing further, Mr. Mason. Thank you, sir. If the court please, the government rests. [1051]

The Court: Is there any rebuttal, gentlemen?

Mr. Muir: The defendants Johnson do not wish to offer any rebuttal.

Mr. Monroe: We have a very few matters, your Honor. First, by reference, I would like to have in the record Article 15, Section 3, of the California Constitution.

The Court: I don't remember it offhand.

Mr. Monroe: It has to do with the tidelands, with the limitation. It is very short. May I just read that?

The Court: Yes.

Mr. Monroe: "Section 3. All tidelands within two miles of any incorporated city or town in this State, and fronting on the waters of any harbor, estuary, bay, or inlet used for the purposes of navigation, shall be withheld from grant or sale to private persons, partnerships, or corporations."

And we would like, next, to offer, if your Honor please, Chapter 46 of the Statutes of California for the year 1923. That is our grant and is, in fact, our deed and I believe it should be read into the record.

The Court: Very well.

Mr. Monroe: I will read this. "Whereas, Since the admission of California into the union, all tidelands along the navigable waters of this State and all lands lying beneath the navigable waters of the State have been and now are held in trust by the State for the benefit of all the in- [1052] habitants thereof for the purpose of navigation, commerce and fishing; and

"Whereas, It is the duty of the State to govern, administer and control such lands and to improve and develop navigation, commerce and fishing thereon and there-over; and

"Whereas, The State has not the general power of alienation of such lands, but may, when the interests of commerce, navigation and fishing require it, convey to municipalities limited and defined areas of such lands with the power to govern, control, improve and develop the same in the interests of all the inhabitants of the State; and

"Whereas, The conveyance to the City of National City of the lands hereinafter described, together with the right to govern, control, improve and develop the same will result in great advantage and benefit to all the inhabitants of the State; it is provided:

"Section 1. There is hereby granted and conveyed to the City of National City, in the County of San Diego, State of California, all of the lands situate in the City of National City side of said bay, lying and being between the line of mean high tide and the pierhead line in said bay, as the same has been or may hereafter be established by the federal government, and between the prolongation into the bay of San Diego to the pierhead line of the

boundary line between the City of National City and the City of San Diego, [1053] and the prolongation into the bay of San Diego to the pierhead line of the northerly line of the street commonly known as Thirtieth Street, same being the southerly boundary of the City of National City, California.

“Sec. 2.

“The City of National City shall have and there is hereby granted to it the right to make upon said premises all improvements, betterments and structures of every kind and character, proper, needful and useful for the development of commerce, navigation and fishing, including the construction and operation of a municipal belt line railroad in connection with said dock system.

“Sec. 3. No grant, conveyance, or transfer of any character shall ever be made by the City of National City of the lands described in Section 1, or of any part thereof, but the said City shall continue to hold said lands and the whole thereof unless the same revert or be receded to the State of California. The harbor of National City shall remain always a public harbor and the said city shall never charge or permit to be charged on any of the premises by this act conveyed any unreasonable rate or toll, nor make nor suffer to be made any unreasonable charge, burden or discrimination. In the event of a violation of any of the provisions of this act, the said lands and the whole thereof shall revert to the State of California. [1054]

“Sec. 4. The City of National City—”

Mr. Crouch: Just a moment, if the court please.

(Whispered conversation between counsel.)

Mr. Monroe: I was also going, your Honor, to call attention to the Act of 1925 and counsel has called my attention to it. And may the record show that Sections

4 and 5 of this Act were amended? So I will simply read Sections 4 and 5 as amended. It changes the term from 25 to 50 years.

"Sec. 4. The City of National City may lease for a term not exceeding 50 years any wharves, docks or piers constructed by it, and all such leases so executed shall reserve to the board of trustees of the City of National City, the right and privilege, by ordinance, to annul, change or modify such leases upon the violation of any of the provisions thereof by the lessees as in its judgment may seem proper. The aggregate amount of all wharves, docks and piers so leased by said city shall never exceed seventy-five per cent of all the wharves, docks and piers actually constructed.

"Sec. 5. The City of National City may lease not to exceed an aggregate of seventy-five per cent of the lands conveyed to it by this act, for a term not to exceed 50 years and upon which wharves, docks or piers have not been actually constructed, and, except by consent of the board of trustees of the City of National City under an ordinance of such board duly adopted, such leases shall not be assignable or trans- [1055] ferable, nor shall any lessee have the right to sublet the leased premises or any part thereof without such consent.

"When wharves, docks or piers have not actually been constructed, provided that where any of said lands are now leased for a period of less than 50 years, the City of National City may extend or renew the same or make new leases thereon, except that the term of such extension, renewal or new lease shall be not to exceed 50 years from the date of such extension or new lease."

Then, going to the 1923 act, "Sec. 6. The State hereby reserves unto itself at all times the reasonable use of and access to all wharves, docks, piers, slips and quays hereafter constructed under the provisions of this act, for any vessel or water craft owned, leased or operated by the State."

We will also offer, by reference, the Act of 1917, Chapter 28. It will be unnecessary to read that in the record at length, your Honor, because it is the same, the 1917 Act, except for Section 6, to which some reference has been made in the evidence, and that Section 6 is as follows:

"Sec. 6. The foregoing conveyance is made upon the condition that the City of National City shall, within five years from the approval of this act, exclusive of such time as said city may be restrained from so doing by injunction issued out of any court of this State or of the United States, and exclusive of such further delay as may be caused by unavoidable misfortune or great public or municipal calamity, issue its bonds for harbor improvement purposes in an amount of not less than one hundred thousand dollars, and shall, within five years after the approval of this act, exclusive of the time in this section hereinbefore mentioned, commence the work of such harbor improvement, and the said work and improvement shall be prosecuted with such diligence, that not less than one hundred thousand dollars shall be expended thereon within five years from the approval of this act. If said bonds be not issued or said work be not prosecuted and completed as and in the manner herein provided, then the lands by this act conveyed to the City of National City shall revert to the State of California."

That is the only difference. There is no such provision in the 1923 act. We would like to call Mr. Rogers.

FRANK W. ROGERS,

called as a witness in rebuttal by the defendant City of National City, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Frank W. Rogers.

Direct Examination

By Mr. Monroe:

Q. Where do you live, Mr. Rogers?

A. In National City. [1057]

Q. And have you any official position with the City of National City? A. That of City Clerk.

Q. As such City Clerk, do you have custody of the records of the ordinances passed by the City of National City? A. I do.

Q. I will call your attention to a lease executed under the date of February 2, 1942, signed by National City by Frederick J. Thatcher as Mayor, to the Tavares Construction Company, and leasing a tract of approximately 18 acres or 800,000 square feet for a period from January 1, 1942, until December 31, 1946. I will ask you whether or not you have examined the records of the ordinances of National City to ascertain whether or not there is any ordinance either authorizing or approving any transfer of that lease to any other person or corporation.

Mr. Landrum: That is objected to, if the court please. It is not proper rebuttal. I consider it as a part of their case in chief.

The Court: It might have been but I think it is a material factor, perhaps not so much so far as the jury is concerned but on other aspects of the case, which the court will have to consider before final decision. Overruled.

(Testimony of Frank W. Rogers)

The Witness: I have. [1058]

Q. What have you found in that regard?

A. I have found no such ordinances.

Q. There is no such ordinance?

A. To the best of my knowledge, there is not.

Q. Mr. Rogers, can you tell us from your examination of the records what payments of rent were made under this lease?

Mr. Landrum: That is objected to for the same reason, if your Honor please.

The Court: I do not believe that is a matter for the jury.

Mr. Monroe: Might I suggest, your Honor, what my purpose is?

The Court: Yes.

Mr. Monroe: My purpose is simply to show that after an alleged assignment to the Defense Plant Corporation no rent was paid; that it has never paid any rent. That is all I want to show.

The Court: Are you going to question that, Mr. Landrum?

Mr. Landrum: No, sir, I will not. I admit it.

Mr. Monroe: That is all.

The Court: It may be material on certain aspects of the matter,—

Mr. Landrum: Yes, I understand, your Honor.

The Court: —which will not be of much interest to [1059] the jury, except it should be in the record so that a proper consideration can be given to that factor at the appropriate time.

Mr. Monroe: That is all.

(Testimony of Frank W. Rogers)

Mr. John M. Martin: Might I ask the witness one question as to one exhibit that has been offered here?

The Court: Yes.

Q. By Mr. John M. Martin: Plaintiff's Exhibit No. 5, I hand you what purports to be a copy and direct your attention to the certificate on the last page thereof. Will you state whether you know, from your knowledge of the records of the City of National City as to whether the ordinance therein referred to was duly passed and adopted?

Mr. Monroe: Pardon me. It refers to a resolution, and not an ordinance.

Mr. John M. Martin: Very well. I correct my statement.

The Witness: I am afraid I can't answer that.

Q. By Mr. John M. Martin: You do not know, of your own knowledge?

A. Not of my own knowledge.

Mr. John M. Martin: Thank you.

Mr. Monroe: If it will help the situation for counsel, I will stipulate that a resolution, as referred to in the certificate, was made.

Mr. John M. Martin: Thank you. I will accept that [1060] stipulation.

Mr. Monroe: That is all, Mr. Rogers.

(Witness excused.)

Mr. Monroe: Mr. Dickson.

DELEVAN J. DICKSON,

called as a witness by and on behalf of the defendant City of National City, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: Delevan J., D-e-l-e-v-a-n J. Dickson, D-i-c-k-s-o-n.

By Mr. Monroe:

Q. Your residence, Mr. Dickson?

A. National City.

Q. What official connection have you with the city?

A. I am the administrative officer.

Q. I will ask, Mr. Dickson, if you are familiar with the area involved in this suit and that is represented by this model that stands before you. I have no particular reference to the structures, but the land itself. Are you familiar with that area? A. Yes, sir.

Q. Do you remember the occasion of that area having been filled in connection with dredging operations in the [1061] San Diego Bay? A. I do.

Mr. Landrum: Just a moment. That is objected to, if the court please. It is not proper rebuttal at all.

The Court: Well, are you speaking of tract A?

Mr. Monroe: I am speaking of the original fill. I want to show that that was done before any of these things came up at all. There was some reference by some witnesses that might leave a bit of doubt.

The Court: Objection overruled.

Mr. Monroe: Would you read the question, please?

(The question and answer were read.)

(Testimony of Delevan J. Dickson)

Q. By Mr. Monroe: And when was that?

A. To the best of my recollection, it was in 1939 or the early part of 1940.

Q. At that time was there any transaction between the City and the Government?

A. The transaction that occurred between the City and the Government was on May 2, 1939, when the City of National City voted an area of approximately 96 acres, which extended south from the north city limits of National City. I am referring to tidelands.

Q. Yes.

A. They voted that area to the Federal Government for the use of the United States Navy for military purposes, and [1062] in the negotiations that were held prior to that election Captain McCandless, who was at that time the commanding officer of the Destroyer Base, represented the fact that if the City of National City gave this—

Mr. Landrum: Just a moment. If the court please, I object on the ground that the statement of Captain McCandless is not binding upon the government of the United States.

The Court: Objection sustained.

Q. By Mr. Monroe: Well, the land was actually turned over to the government; is that right?

A. That's right, sir.

Q. And the dredging was actually done in 1938 and '39? A. That is correct.

Mr. Monroe: That is all.

(Testimony of Delevan J. Dickson)

Cross Examination

By Mr. Landrum:

Q. Just one further question. Of course, you know, do you not, that there was other dredging and other filling done by the Tavares Construction Company later on, when they came in there, which was paid for by the government, do you not?

A. I don't know about that, sir. I was in the Navy at the time.

Mr. Landrum: That is all.

Mr. Monroe: That is all.

(Witness excused.) [1063]

Mr. Monroe: That is all our rebuttal, your Honor.

The Court: Any further rebuttal?

Mr. Sloane: I would like to recall Mr. Brennan, Mr. Joe Brennan.

JOSEPH W. BRENNAN,

recalled on behalf of the defendant San Francisco Bridge Company, having been previously sworn, was examined and testified further as follows:

Direct Examination

The Witness: Do I have to swear again?

The Court: You have been sworn.

The Witness: Yes.

By Mr. Sloane:

Q. Mr. Brennan, will you refer to Exhibit No. 1 and give us some information about the relation of the water area to land area, both being tidelands, so-called? Do you understand from Exhibit 1 that the area marked in green

(Testimony of Joseph W. Brennan)

represents water, as it stood in November, 1942, and that the other colors represent land? A. Yes.

Q. Now, will you state—this is with reference to some testimony given by a government witness to the effect that the City of San Diego collects rent for wharves in the dredged areas of tidelands. Is that the fact?

A. Yes, sir. [1064]

Q. Does the City of San Diego include in those leases water areas? A. Yes, sir.

Q. They are designated in what manner in the leases?

A. We have what we call a tideland lease and a wharf franchise. The wharf franchise takes in the water and the tideland lease takes in the land.

Q. Does the City collect rent for the land and for the use of the water? A. Yes, sir.

Q. Are there any instances in which the City collects rent for the use of the water alone? A. Yes, sir.

Q. In your opinion, does water alone have a rental value in this community? Did it have, in 1942?

A. Yes, sir. It depends on the purpose you want to use it for. For example, an oil dock. As a rule, the oil dock does not require any land. We have the Standard, the Union, the Shell, the Richmond and the G. P., and they just rent an area of water to construct their docks, to pipe the oil up to the fee land in the rear.

Q. Having reference to other industries now which make a combined use of land and water, will you explain how that is done? A. The combined use? [1065]

Q. The combined use of land and water.

A. You mean how it is done?

Q. Shipyards, for example.

A. What do you mean?

(Testimony of Joseph W. Brennan)

Q. How do they combine those?

A. You mean the way we give a tideland lease and a wharf franchise?

Q. Yes, and in actual practice what use would a shipyard make of water?

Mr. Landrum: Just a moment. If the court please, I am going to object. That is not proper rebuttal, what use would a shipyard make of water?

The Witness: They don't drink it.

The Court: We have here a unique use of waterways with respect to shipbuilding. I don't believe that other instrumentalities, such as dry docks would be applicable.

Mr. Sloane: I think not, your Honor. I am referring to the uses which parcel 7 would have, leaving out of account this development by Tavares.

Q. By Mr. Sloane: Referring to the map, can you tell us what high use could be made of parcel 7 in connection with the use of the land area immediately adjoining, I mean, of the water area immediately adjoining?

A. Which one is parcel 7 now?

Q. Parcel 7 is the blue strip which was leased by [1066] National City to the San Francisco Bridge Company.

A. It gets back to the same old story. If a fellow wants to get something on the water front, an industry that has to have water and land, one is no good without the other. If a shipyard wanted to go in there or a cannery, or anything that required water frontage, he would have to have them both, or else he might just as well go out to El Cajon if he does not use or does not require the combination of the two.

Q. In fixing the rental value of the property which requires both land and water, do you take into account, in

(Testimony of Joseph W. Brennan)

the practice of the City of San Diego with which you are familiar, a distinction between the value of the water and a distinction between the value of the land, or do you lump them together, or how is it treated?

A. In making a lease, you mean?

Q. Yes.

A. Well, as a rule we make the land bear the greater amount, and then the water area in front is given the lessee, the right to use. Then he is charged a nominal rental for that. We could just as well put it all in one, or we could divide it up equally between water and land, but we have not done so. As a rule we do it that way where they take both. Then if a man takes a strip of water in front of the bulkhead line and does not require any land ashore of it, then he pays for it as he pays a greater amount. He pays an equivalent [1067] amount so that the land that is cut off in back of the water does not have to bear the same rate that it would have if it had them both.

Q. Let's take the example of where the land to the rear of the tideland is taken by a leasehold carved out in the front, as illustrated by parcel 7, which fronts on the water and cuts off parcel 2 entirely, that is the yellow portion, and a part of parcel 3, which is the blue. Is there any distinction made in the rental value of the cut-off portion of the land, as compared to the frontage portion of the land, assuming that frontage portion is about 218 feet in width?

A. Do you mean, do we have any cases like that?

Q. Yes, do you have cases like that?

A. Where there was leased land there, cut off in the back?

(Testimony of Joseph W. Brennan)

Q. Yes.

A. Interior land. We have got only one that I can recollect and that is where we leased the water in front to an oil dock, and we made him pay as much as if he had taken the land in back, because it detracted from the value of the land, but I don't know of any similar case that we have to that.

Q. But as a matter of reasonable value, would the same rule apply, if it cut off the frontage from the water?

A. We' would make the other fellow, we would make him [1068] pay as much; so that we wouldn't have to get as much for the land, if that is what you mean.

Q. Then when reference is made to leases, as stated, by the City of San Diego, am I to understand that the rental value attributed to land covers also the rental value of the water, except where there is some nominal charge made?

A. How is that? I don't understand that.

Mr. Sloane: Would you read the question, please?

(The question was read.)

The Witness: I still don't know what you mean.

Q. By Mr. Sloane: Is that any better on a second reading, or shall I start again?

A. No, sir, I still don't know what you are talking about. If you want to know the difference between the land and water, if there is a difference on that?

Q. You might get at it that way. Tell me if there is a difference, and why, and if you know, who pays for it, and how? A. Who pays for which?

Q. You let me ask the unintelligible questions.

A. I can't understand that.

(Testimony of Joseph W. Brennan)

The Court: Just a moment, please. Let us take that illustration that you gave about the oil company leasing the water and not having the land. Would that explain it?

The Witness: Yes, sir, that might. If they leased just [1069] the water, it has been our practice in the years we have been making leases to charge more than if they took the land and water, and when they take the land and water we feel that one should go with the other. For example, a shipyard has to run its ways out in the water, and a cannery has to have piers to bring their fish ashore, and that sort of thing. Therefore, they have to have them both and can't operate one without the other. So we put the bulk of the rental on the land and give him a nominal rental on the water, in order that he can control the water. For instance, if he did not have some means or option or control over the water anybody could come in and anchor that wanted to and this way he can keep them out and keep it clear of ships.

The Court: Does that explain it?

Mr. Sloane: I think it does.

Q. By Mr. Sloane: Mr. Brennan, since you were in court the other day, have you prepared a schedule showing the rentals in effect on city leases during 1942?

A. I had the office do it. We had more darned fellows going through our records on first one thing and then another, so I didn't know if I was running the office or they were. So I had them go through the records and make this document up. Is that what you refer to?

Q. By Mr. Sloane: Yes.

A. Yes, sir, that was prepared in my office. [1070]

Mr. Sloane: I don't know if this is strictly rebuttal, but I would like to place that in as a summary of the evidence which has been hinted at before.

(Testimony of Joseph W. Brennan)

The Witness: That gives when the lease was entered into and then the rental rate in '42.

The Court: Show it to counsel.

Mr. Landrum: I have seen it, your Honor.

The Court: It is a tabulation.

Mr. Landrum: The exhibit is objected to, first, upon the ground and for the reason that it is incompetent, irrelevant and immaterial, in that it recites leases which are too remote, going back more than 10 years before the date of taking; second, upon the ground and for the reason that it does not state the entire situation with relation to the rental value of those leases, and that it only refers to the rent being received at a certain time, and does not cover the whole period, as evidenced by the exhibit; third, upon the ground and for the reason that it reduces to writing testimony which should be given orally.

The Court: Well, does the instrument which will be marked, for identification,—

The Clerk: Defendants' AA.

The Court: —correctly state all of the leases during the period that is covered by the instrument? [1071]

(The document referred to was marked Defendant San Francisco Bridge Company's Exhibit AA, for identification.)

The Witness: Yes, sir. In other words, what we did, we took the leases the other day, and when I was on the stand, they kept harping on '42, '42, '42, and I was thinking more in terms of the general layout. So we took the leases and, for instance, Arrowhead was granted—

Mr. Landrum: Just a moment. If the court please,—

(Testimony of Joseph W. Brennan)

The Court: Just a moment. They are objecting to that, and I want to find out the purpose. I do not think you understand what is in the mind of counsel and what the court has to determine.

The Witness: Yes, sir.

The Court: Does this instrument which you have before you, which has been marked for identification, contain a tabulation of all of the leases of the City of San Diego during the period that is covered by the document?

The Witness: No, sir.

The Court: Objection sustained.

Mr. Sloane: That is all.

Mr. Landrum: That is all, Mr. Brennan. Thank you, sir.

The Witness: You are welcome.

The Court: You will leave that here, Captain. It has been marked for identification. [1072]

The Witness: Yes, sir.

(Witness excused.)

The Court: Any further rebuttal?

Mr. Crouch: I think we could conserve the time of the court and the jury if we adjourned for lunch at this time.

The Court: You think there will be some rebuttal this afternoon?

Mr. Crouch: A little, yes.

The Court: Ladies and gentlemen, we will take a recess until 2:00 o'clock this afternoon. Remember the admonition and keep its terms inviolate.

Gentlemen, I would like to have counsel remain after the jury leaves.

(Thereupon the jury retired from the court room, and the following proceedings were had outside the hearing and presence of the jury:)

The Court: I think all the jurors are without hearing now. The record will so show.

The court has concluded, gentlemen, that except as to the Tavares interests, the date of taking will be November 10, 1942, as to all interests. I have not been able yet to determine definitely those instructions which will be given and those which will not be given. I am still working on those. Before the argument, and although it is not required [1073] strictly, because this is not an action covered by the Rules of Civil Procedure, I propose to tell counsel exactly what the charge will be. But I shall expect counsel to confine themselves to a discussion of the facts and not the law.

Now, can you give any indication as to when you will be able to reach the argument stage of the case?

Mr. Landrum: So far as the government is concerned, we have reached it now, your Honor.

Mr. John M. Martin: I think perhaps a half hour in rebuttal would cover us, your Honor.

The Court: Then I would like to have some indication from you as to the argument, the length of time that the defense thinks it is entitled to. It has the opening and closing of the argument. Also, as to how you are going to apportion the argument.

Mr. Landrum: If your Honor please, could I say just one word?

The Court: Yes.

Mr. Landrum: I am working under a terrific handicap. I have to go into court in the trial of another case about 2,000 miles from here next Monday morning. If there

is any way that we could expedite this matter by your Honor holding a little later, or something, I would appreciate it very much. That is all I have to say.

The Court: If we conclude the evidence by 3:00 [1074] o'clock today, you might have the opening argument for an hour and a half today. Then tomorrow is Thursday. That is the Seattle case you refer to?

Mr. Landrum: No, your Honor. I am going back to Michigan.

The Court: Well, let's have the various indications first.

Mr. Monroe: Might I suggest—I suppose somebody has to start a suggestion—I would like to have a total opening and close of at least an hour. I probably will not use that much, but I would like at least to feel that I had the privilege of going that long, if it was necessary.

The Court: All of the argument on behalf of the defendant, National City, will be made by you, Mr. Monroe?

Mr. Monroe: I think so, yes.

The Court: Then perhaps we should consult the San Francisco Bridge Company next.

Mr. Sloane: I should like to stake a claim out for an hour and return as much of it as possible to the court. That is for both the opening and closing.

The Court: Then the Johnson interests?

Mr. Muir: Your Honor, I think about half an hour will suffice.

The Court: Now, the Tavares' interests?

Mr. John M. Martin: If the court please, it is quite [1075] certain that I will make the opening argument and Mr. Crouch the closing argument, and I really think that

we will need two hours for the opening and closing combined, in order to cover the picture completely. I would like very much not to be required to start that argument today. I think I could save time if I didn't commence our argument until tomorrow.

Mr. Landrum: Your Honor please, it is absolutely necessary that I leave here on Friday morning.

The Court: You will have to turn it over to Mr. Berrey, then, or wire back there and tell the court that there is an adamant, arbitrary judge out here in California,—

Mr. Landrum: No, sir, I will not do that.

The Court: —that insists upon the government concluding this case and it cannot be concluded in that time.

Mr. Crouch: Your Honor please,—

The Court: Just a moment. That is four hours and a half for the defense. How long do you want, Mr. Landrum?

Mr. Landrum: I will cover it all in an hour, your Honor; all of it.

The Court: I think we ought to shade that a good deal, gentlemen, without any injustice to any of the litigants. I know counsel pretty well. I think I know all of them and I think that you can cover the case pretty thoroughly in less time than that suggested.

The argument will be limited as follows: 45 minutes for [1076] National City; 45 minutes for the San Francisco Bridge Company; one-half hour for the Johnson interests; one hour and a half for the Tavares interests.

The government, of course, will have an equivalent period of time in which to present its argument.

We shall expect, of course, gentlemen, that all of the defendants will present their cases in the opening argument and will not reserve matters to close where the government will have no opportunity to reply.

Then can't you agree, amongst yourselves, without the court attempting to undertake the feature of designating who shall open the argument?

Mr. Monroe: I assume we can. I don't think we will have any difficulty with that.

The Court: We will proceed with the arguments this afternoon, if we finish before 3:00 o'clock, or at 3:00 o'clock.

Mr. John M. Martin: I would like to inquire if it is the thought that we shall follow the same sequence we have heretofore followed?

Mr. Monroe: That is satisfactory with me.

Mr. Sloane: That is satisfactory.

Mr. John M. Martin: All right.

The Court: Is that satisfactory?

Mr. Landrum: Yes. [1077]

The Court: So ordered.

Mr. Monroe: Might I ask one other thing? A suggestion has been made about the form of the verdict, your Honor.

The Court: Yes.

Mr. Monroe: Mr. Landrum has suggested a verdict which, in form, seems all right, but it is one verdict covering all interests, and this thought was suggested, and it

seems to me well taken; that there are several interests, and I refer now particularly to the Johnson interest, a smaller interest. Such a thing might be possible that for some reason the jury might not get together on every feature, and for that reason my suggestion is that separate verdicts be rendered as to the separate interests. I have mine prepared if that will expedite it any.

Mr. Landrum: The government will certainly object to any such suggestion, in so far as the City of National City and the San Francisco Bridge Company is concerned, upon the ground and for the reason that, as I understand it, they should first, as I have set up in the proposed verdict, determine the overall value of the fee, and then allocate from that, for the assistance of the court, what they allocate to the San Francisco Bridge Company. If you give the jury two separate verdicts, they will certainly be confused in that situation, if your Honor please. They could add to the fee value of that property what they give to the San Francisco [1078] Bridge Company.

Mr. Monroe: Well, I assume the court's instructions will properly reach that.

The Court: Have you all seen this proposed form of verdict?

Mr. Monroe: I have seen it.

Mr. Sloane: I have seen it.

The Court: It strikes me that is better than separate verdicts. I appreciate what Mr. Monroe has stated, but that is an eventuality that occurs in every case. It may occur not only with respect to the Johnson interests, but with respect to the other interests.

Mr. Monroe: Might I make one further suggestion about the form of the verdict, and I think it affects directly my interests, and that is this: as the verdict is worded, I of course understand it and you of course understand it, but the jury is instructed they must take anything that is to be awarded to the Bridge Company out of our award. Fine, well and good. The way that is worded, however, there is still the chance that the jury will take the award of the Bridge Company out of our award, that is, write down our award and write down the Bridge Company's award, and the net result will be that we get it taken out twice. [1079]

I have seen so many of those kinds of errors made by juries that I do not like that form.

The Court: What would you suggest as a modification of the wording?

Mr. Monroe: I would suggest there being awarded a sum to the City, a sum to the Bridge Company, and that the jury be instructed that they must first fix the overall verdict and then award to each his part.

Mr. Landrum: Counsel seems to think this is an action in personam and it is an action in rem.

The Court: It seems to me the testimony is pretty clear, those who testified for the San Francisco Bridge Company's interests and the National City's interests, and they have segregated the amounts which they have allocated to the Bridge Company, and also in their statements of the problem have given the balance that would be due to the City of National City.

Mr. Monroe: I understand that.

The Court: If that is argued properly, I do not think there will be any confusion in this verdict.

Mr. Monroe: Does the court care to indicate further one other proposition before we start the argument, because I would like to be informed, if I can. I have taken the position in instructions that I have asked for, that because of the inhibitions contained in the constitution and the statute [1080] that the officers of the City have not the power to transfer, either by lease or by conveyance, or by anything else, any component part of the fee to anyone, and that, therefore, although the Bridge Company may receive properly out of the total award anything that arises by reason of the improvements, or matters of that kind that increase both the value of the fee and the value of the leasehold, that no award may be made because of the mere fact that it is claimed that the City; made an improvident lease to the Bridge Company. As I recollect it, the Bridge Company has made a claim of \$50,000 because the City gave them a lease for less than it was worth.

Mr. Sloane: We are claiming an item of \$125,000 because they had a lease that was worth that much money, and I think we are entitled to a verdict determining that value.

The Court: Which one of your instructions are you referring to?

Mr. Monroe: I think the last one.

The Court: The last one?

Mr. Monroe: The last one, No. 12.

The Court: I will give you the copy I have here.

Mr. Monroe: Yes, No. 12.

The Court: Have you seen this proposed instruction?

Mr. Sloane: Yes, your Honor. It is highly improper, in my opinion. I really haven't taken it seriously. [1081]

The Court: Yes, I think I had about concluded not to give that instruction, and I shall now answer counsel's query directly, that the instruction will not be given.

I have not been able to satisfy the court's mind on some of the other matters, but I think I can do so before the argument is made. This will not be given except as to matters which are accurately stated in other portions of the instructions.

Mr. John M. Martin: May I inquire, your Honor, as to whether there is any objection to counsel in opening argument consuming more than one-half of the allotted time?

The Court: No. I would be very glad to have you do that, because I think you should open the argument in extenso and fully, so that the government knows exactly all of the problems that you are covering.

Mr. John M. Martin: That probably will mean I will take the greater portion of the time allotted us, and I was wondering if there was any objection.

The Court: No. You can say a great deal in an hour, or even in 40 minutes. I once heard it said that if a man could not say a thing in 20 minutes he could not say it in 20 hours.

(Thereupon, at 12:15 o'clock p. m., a recess was taken until 2:00 o'clock p. m.) [1082]

San Diego, California, Wednesday, February 26, 1947,  
2:00 P. M.

(The following proceedings were had in the presence and hearing of the jury.)

The Court: All present. Proceed.

Mr. Crouch: We will call Mr. Joe Brennan.

JOE BRENNAN,

recalled as a witness in rebuttal by and on behalf of the defendants Tavares Construction Company, et al., having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Crouch:

Q. Mr. Brennan, there was some evidence received yesterday from a government's witness, Mr. Tom Mason, wherein he mentioned a number of parcels of tidelands that were held in private ownership. He mentioned the Banning property in Los Angeles, in the west end of the West Basin of Los Angeles Harbor, and a piece of property adjoining that owned by Lucy Rice Banning, and a tideland piece on Mormon Island acquired by the Pacific Coast Borax, and on the westly end of Mormon Island, of the Banning Estate, where the town of Wilmington was formed and the East Basin of Los Angeles Harbor where the Union Pacific owned two triangular pieces of 10 or 15 acres, each on both sides of the Cerritos Channel, and on the channel that runs from Long Beach to Los Angeles Harbor he said [1083] the Union Pacific owned tidelands, and that as "we approach Los Angeles Harbor" the Los Angeles Dock & Terminal Company owned practically all of Long Beach Harbor at one time; that

(Testimony of Joseph W. Brennan)

it sold holdings to the Los Angeles Dock and Terminal Company, and the Southern Pacific owned land that fronts on Channel No. 3 and Channel No. 2 in Long Beach, where they sold some of it to the Los Angeles Soap Company, or Proctor & Gamble. Can you throw any light on the question as to whether those are, in reality, tidelands within the basin or harbor of the municipality? What can you tell us on that subject?

A. Well, to start in, it sounds like they got all of it; that San Pedro hasn't any harbor left. I am not familiar with all of the details of it. All I know is what is applicable here in San Diego.

Mr. Landrum: Your Honor, I submit, if the court please, he can't answer the question.

The Court: I think he has shown by his answer that he can't answer it.

The Witness: What do you mean, I can't answer it?

The Court: There are certain factors that the court will take judicial knowledge of. Some of those are included in your question.

Q. By Mr. Crouch: Will you explain to the jury how it sometimes occurs that there are pieces of land which either be-[1084] came tidelands or where they thought once they were tidelands and they were excluded from that category?

Mr. Landrum: That is objected to, if the court please, as not proper rebuttal of anything.

The Court: I don't know what counsel has in mind, whether an accretion or diminution.

Mr. Crouch: No; I don't have that in mind. Perhaps I can frame a question that will make it clearer.

(Testimony of Joseph W. Brennan)

Q. Will you describe to the jury what determines whether lands are or are not tidelands?

Mr. Landrum: That is objected to, if the court please. It is not proper rebuttal and doesn't go to rebut anything that the witness said.

The Court: I think that is a question of law, largely. There are certain principles of law which are laid down for the ascertainment, by appropriate engineers. After all, the question of tidelands is a question of law that has been settled by the Supreme Court of California. The Banning case was mentioned, in Los Angeles Harbor. Sustained.

Q. By Mr. Crouch: Mr. Brennan, is the question of whether or not lands are or are not tidelands always finally determined by engineers?

Mr. Landrum: That is objected to, if the court please.

The Court: I think that is a question of law. The courts have settled that; that they are not all determined by engineers; [1085] that they are ultimately determined by the courts.

Mr. Crouch: That is right. [1086]

Q. By Mr. Crouch: Now, confining your answer to harbor lands within the City of San Diego, will you give us a little of the history of the development of San Diego Harbor and its effect upon the lands of people who held lands near the ocean?

Mr. Landrum: That is objected to. It isn't proper rebuttal. If there is anything to it, it is in their case in chief, if your Honor please.

The Court: I cannot discern what counsel has in mind. I think it is common knowledge, and the history of

(Testimony of Joseph W. Brennan)

the times would undoubtedly indicate it, so that it would be a matter within the knowledge of the court as to the tremendous harbor development, and the metropolitan aspect of it, in the vicinity of San Diego during the last few years. If that is what you want to show, I think counsel would not be in a very good position with this jury of citizens to argue against a matter of that kind.

Mr. Crouch: Your Honor please, I cannot state what I expect to prove by this witness.

The Court: You can come to the bench and state it. As I say, I cannot quite discern what counsel has in mind.

(Thereupon the following proceedings were had between the court, Mr. Crouch and Mr. Landrum, outside the hearing of the jury:)

Mr. Crouch: I want to show that until the mean high [1087] tideline has been definitely established by court action that no one can know whether or not, when he owned land bordering on the ocean, his lands are or are not tidelands, and that in the establishment of the mean high tideline, the result has been that a considerable portion of property which individuals thought they owned has been taken from them by the establishment of that line and place them within the category of tidelands, and vice versa, that many parcels of property which the owners considered to not be so, or to be considered to be tidelands, when the line was established they found that their lands were under private ownership, and that that is the reason for the instances referred to by the witness Mason.

Mr. Landrum: That would be objected to upon the ground it is not proper rebuttal, and, second, on the ground it is a question of law, and, third, this witness has

(Testimony of Joseph W. Brennan)

indicated already he is not familiar with anything except San Diego Harbor.

The Court: I do not see the materiality of it at all in this case.

Mr. Crouch: I beg your pardon?

The Court: I do not see the materiality of it in this case, regardless of the characterization of the lands, whatever they may be, that had been taken by the government, whether they were tidelands or submerged lands, or other [1088] lands, as to everything that has been taken in this action. What difference would it make?

Mr. Crouch: In my opinion, it goes to this, that we have presented evidence to the jury which would justify them in the conclusion that when the Tavares Construction Company got the fee title to these lands, they were not longer subject to any of these tidelands Acts or Statutes, and they would almost have a monopoly in the class of lands or the title.

The Court: There is a good deal in the record already on that.

Mr. Crouch: Now, the government, to offset that, brings in this witness and they show a lot of lands they claim fall in that category. I want to show they do not.

Mr. Landrum: How can you show it by this witness if he says he is not familiar with it?

Mr. Crouch: You can't show everything by one witness.

Mr. Landrum: It is in their case in chief, unquestionably, and has all been gone into.

The Court: I think so. I do not think it is material. I cannot see the materiality of it. If we had anybody except the government of the United States as the con-

(Testimony of Joseph W. Brennan)

demnor, there might be some feature there that would be proper. I do not mean to say that it would be proper rebuttal or in the case in chief. I don't think it makes any difference how [1089] this witness feels about the tidelands in San Pedro Bay, because we know what they are.

Mr. Crouch: But this came out in their case.

The Court: What is that?

Mr. Crouch: This evidence here as to these instances came out in their case.

The Court: And your cross examination was to show the comparative situation. In other words, these witnesses attempted to show a comparable situation as a basis for their opinion. They have cited these instances. This man is not in that category. He may be a very fine man, and is undoubtedly, but he has his limitations so far as the effect of his testimony is concerned. He apparently does not know much about the litigation in and about Los Angeles Harbor, because we happen to know a good deal about that ourselves.

I think I will sustain the objection. [1090]

(The following proceedings took place in the presence of the jury:)

Mr. Crouch: I understand the objection was sustained?

The Court: The objection is sustained.

Q. By Mr. Crouch: Mr. Brennan, do you know of any tidelands in the Bay of San Diego that are privately owned?

Mr. Landrum: That is objected to. It is not proper rebuttal. It doesn't go to the question at all.

(Testimony of Joseph W. Brennan)

The Court: Overruled. I think, technically, you are correct but I will overrule the objection.

The Witness: No, sir; there is none.

Mr. Landrum: I move that the answer be stricken as not responsive to the question.

The Court: It is just a direct way of getting at it. He should have answered it yes or no first.

The Witness: No.

The Court: We will strike it out if you want it that way.

Mr. Crouch: You make me work awfully hard, counsel.

The Court: Now, will you read the question to the witness, Mr. Reporter?

(Question read.)

The Court: Yes or no.

The Witness: No, sir.

Q. By Mr. Crouch: You have had considerable experience [1091] in the—how many years was it? 29?

A. 29; yes, sir.

Q. —in the 29 years of being Harbor Master for the City of San Diego, in the matter of leasing tidelands to people who wished to establish industries in this area, requiring water transportation, have you?

Mr. Landrum: That is objected to, if the court please.

The Court: Let counsel finish his question.

Mr. Landrum: I understood he had finished it, your Honor.

The Court: Did you finish the question?

Mr. Crouch: I think so, your Honor. Anyway, I will stop there.

The Court: Read it.

(Testimony of Joseph W. Brennan)

(Question read by reporter.)

The Court: It is already in the record that he has but he can say so again if he wants to.

The Witness: Yes, sir.

Q. By Mr. Crouch: Have you an opinion as to whether or not any tidelands in and around the San Diego-National City area, if they were free from the restrictions contained in the various grants of the legislature to the municipalities, so that they could be alienated and sold or leased for an indefinite term of years, and have an unrestricted fee title, would or would not be more valuable than such lands held under [1092] a municipal lease thereof, subject to the restrictions contained in the tide-lands acts?

Mr. Landrum: That is objected to, if the court please. It is not proper rebuttal. Second, it is immaterial. I very respectfully request the court, if I am correct, that counsel be requested to not repeat the question.

The Court: I thought that would be obvious. This jury looks to me like a very intelligent body of men and women. That would seem to me to be obvious. You may answer it if you desire but we know what his answer will be because it is an obvious situation.

The Witness: Certainly, I have an opinion; yes.

Q. By Mr. Crouch: Will you state that opinion?

A. Naturally, it would be worth more.

The Court: That would be obvious, wouldn't it, Mr. Brennan?

The Witness: Yes, sir.

The Court: It doesn't take a learned, experienced mariner or harbor manager to indicate such, does it?

The Witness: No, sir.

(Testimony of Joseph W. Brennan)

The Court: If you have any restrictions on something, it would be different than if it was unrestricted, of course.

Mr. Crouch: Yes, your Honor; I realize that and it all led up to this question.

Q. How much more, in your opinion? [1093]

Mr. Landrum: That is objected to, if the court please, as not rebuttal.

The Court: That is a question for the jury; sustained. That is what they are called here for, to use their processes to determine.

The Witness: I—

The Court: Never mind, Mr. Brennan.

Mr. Crouch: I guess I'd better let you go, Mr. Brennan. That is all.

Mr. Landrum: That is all, Mr. Brennan.

The Witness: Thank you. Can I go now?

The Court: As far as I am concerned.

Mr. Landrum: If the court please, I would like the record to show what happened just now. I would like the court to ask the jury if they heard the remark that Mr. Brennan just made as he passed them, and, if they did, I would like to have a record made of it.

The Court: I am sorry if he made any remark. He should not have done so.

The Witness: I said, "I am finished."

Mr. Landrum: You said, "It is up to you fellows."

The Court: I think we understand Mr. Brennan's disposition. I don't think he intended to say anything out of the way.

Mr. Landrum: I hope it is up to them, if your Honor please. [1094]

The Court: Of course, ladies and gentlemen, I apprehend that you are going to take the testimony given on the witness stand and not decide the case otherwise. I didn't hear what Mr. Brennan said. If he did say anything, divorce that from your minds and do not draw any inferences from it that would be unjustified.

Mr. Crouch: The Tavares Construction Company rests.

The Court: Is there any surrebuttal?

Mr. Landrum: If your Honor please, does the government understand that all of the defendants have now rested?

Mr. Monroe: Yes, your Honor.

The Court: That is the understanding of the court and, apparently, that is the situation.

Mr. Landrum: That being true, if your Honor please, the government now rests. And at this time I move the court to strike from the record in this case and to instruct the jury to disregard all evidence as to value in this case by the witnesses for the Tavares Construction Company, and the grounds of this motion are the grounds of the general objection which I have heretofore made is of record in this case, all four points.

The Court: The motion to strike out is denied and the case will be given to the jury with appropriate instructions on the law of the case.

Mr. Landrum: Under your Honor's ruling, I take it [1095] is not necessary for me to have a specific exception.

The Court: You may have one if you desire.

Mr. Landrum: On this particular question?

The Court: Yes, sir.

Mr. Landrum: I take an exception. The government rests.

The Court: Proceed to the argument, gentlemen. [1096]

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[Arguments to the Jury on Behalf of the Defendants.  
Not printed.]

#### ARGUMENT ON BEHALF OF THE PLAINTIFF

Mr. Landrum: May it please the court, ladies and gentlemen of this jury: In the beginning may I not personally express to you my own personal appreciation of the attention which you have given throughout the trial of this law suit, and may I not express to counsel my personal appreciation of the courtesies and kindnesses that they have shown to me as we have gone along.

Ladies and gentlemen, it will be my purpose to sit down with you and discuss the evidence in this case because you took an oath that you would decide it fairly and impartially between the people of the United States and these defendants from the evidence that you hear from that witness stand and the law as it will be given to you by this court.

I shall try to be entirely fair. I shall not speak an unkind word with relation to anyone who has appeared here. I hope, if at some time in the fervor of the moment I may say some things that don't just jibe, you will forgive me for it. I do not mean to do it. If in the little talk that we are to have I say something with relation to the evidence which you feel is not proper and is not in accordance with your recollection of it, then you forget

all about me and decide it from here (indicating), where you live, decide it rightly and justly.

Also, at the beginning, I want to say to you that there [1165] is no man, woman or child who could plead with you any more fervently than I can to give to these people—give to these people—give to these people every dollar to which they are entitled, but not one penny more. And at the beginning also I want to say to you that it is very, very, very important that you should pay particular attention to the law, as it will be given to you by this court. You are the judges of the fact. His Honor will give you the law to apply to those facts. And, ladies and gentlemen, as I said to you some few days ago, if you will decide this case fairly and impartially between the United States of America and these defendants, your greatest recompense will be a consciousness of a duty performed.

I am going to undertake to discuss this case with you very briefly. Sometimes throughout the trial of it I have become discouraged. It hurt a little in here (indicating), where I live with myself, and then it seemed that when I was down, with all of the brilliant counsel on the other side, and my friend Bob and I sitting over here, I seemed to hear a voice that said, "Go on. Go on. Go on." That that sustained me was the voice of the American people.

There have been statements made by counsel in this case, ladies and gentlemen, which, in my humble opinion, did not jibe with the sworn testimony from the witness stand. Justice is not administered by leaving out things, by picking [1166] up a little here, and picking up a little there. Justice is administered by taking the case by its four corners and letting the light of day in on every scintilla of it.

I am sure that in so far as counsel for Mr. Johnson is concerned, he is very earnest, he is very fair, but, ladies and gentlemen of this jury, he said that the people of the United States, whom I have the honor to represent and whom I am very proud to represent in this court room, would try to get this property as cheaply as possible. He talked about gross rentals and capitalized them. Before I get through, you and I are going to talk about this capitalization method of income.

Then, ladies and gentlemen, he said that Mr. Johnson had had no revenue whatsoever since 1942. I say that that was unfair, because you know in this case that as a remuneration, or as an item to take the place of that rental, he will be entitled and he will get from this court six per cent interest on top of everything you give him. Now, is it fair to say that he has lost rentals when he is going to get six per cent on your verdict from November 10, 1942, or until the money was placed in this court for him under the declaration of taking in this case. Then crowning all was his statement that Mr. Schmutz had increased Mr. Goodwin's figures by \$1,000. Ladies and gentlemen, when I was a little boy and we used to shoot marbles, we used to put some marbles in [1167] a ring. We would draw a big ring, and we used a tau to shoot the marbles from outside of the ring, and if we hit some marbles and we knocked those marbles out, those were ours. In those days we would say to somebody who sneaked inside of that line that he "fudged" a little. The matter of fact is that Mr. Schmutz and Mr. Goodwin were not \$1,000 apart, but it was, as I have it here, \$750. If you wrote it down and I am wrong, all right. If I am right, all right.

The City of National City came in here and made the statement that we were taking the property away from a man who didn't want to sell it. Ladies and gentlemen, his Honor will tell you that the willingness or unwillingness of this fictitious or this assumed seller and buyer is not for your consideration. It doesn't make any difference. Fair market value is a meeting of the minds of a seller willing but not compelled to sell and a buyer willing but not compelled to buy. So I say, in fair and in justice, the statement that they did not want to sell it has no place in your deliberations.

Now, a peculiar situation arises here,—a peculiar situation. The City of National City comes in here and they want to capitalize—what? They want to capitalize something that they didn't get. This capitalization of income intrigues us, and I am not going to take your time in reading you figures about millions and millions and millions [1168] of dollars, because that can happen and they can take figures and prove almost anything they want to. But when the City of National City comes in here and says that they went to capitalize the income which they had received or were to receive for this property, which they on the 10th day of November, 1942 were receiving through the lease to the Tavares Construction Company, which they, out of their own mouths, said was not legal—if they capitalize that, they will find it is \$8,000, and then the only other money that they were receiving as income from this property was what they were receiving from the San Francisco Bridge Company, and the San Francisco Bridge Company was paying \$10 a month, or, \$75 a month. Ladies and gentlemen, they were receiving no income whatsoever from the balance of that land, and they had not received any income for any of it until the

government of the United States had to come in there due to the exigencies of the war and they capitalize it before they came there, before Tavares came in there. Why do they ask you to capitalize something that in the dim and distant future they say they are going to receive one cent a square foot or 10 cents a square foot for. Why do they bring that in? They don't ask you to capitalize the rental of the Tavares, added to the \$120 a year that the San Francisco Bridge Company was paying. If they asked you to do that, you have got \$8,100. Capitalize it at five per cent; capitalize it [1169] at ten per cent. At five per cent it will give you an overall value on all of that property of the City of National City of \$160,000. Capitalize it at ten per cent and it will give you a total overall value of \$81,200. Isn't that sufficient to demonstrate to you that the capitalization method can be made to do almost anything you want it to? In other words, give me the rate of capitalization you want me to use, and I will give you the figure you want.

Let's get along. The San Francisco Bridge Company came into this case, and they said, "They kicked us out." Now, that isn't testimony. The testimony is that they had a leasehold interest there, and due to the war it became necessary for, as counsel says, your government and mine to take this property, and they told them when they would want it. But, as I said to you before, fair market value contemplates a willing seller and a willing buyer. Counsel's argument with relation to the City of National City was most intriguing. Why, of course, I am being paid. That is fair, isn't it? Why, of course, I am being paid. Every lawyer in this court room is being paid. Every expert witness who went on this witness stand is being paid. Now, why? Oh, why? My

mother, when I was a child at her knee, said to me, "Son, respect your elders. Respect your elders. Respect your elders." And why should Mr. Cotton—why should Mr. Cotton be ridiculed because he got \$1,000. Now, right [1170] while we are there—right while we are there, there, ladies and gentlemen, was the only appraisal of this property made—made—made prior to the filing of this law suit. I give you, Mr. O. W. Cotton of the City of San Diego, the only man, the only witness that made his figures and his opinion of this value prior to the bringing of this law suit. He made it for the Tavares Construction Company and the Maritime Commission. He delivered it to the Tavares Construction Company. They have had it from that day to this. Never during that intervening period from September, 1942, until the time that that gentleman went on this witness stand did they ever tell him that they didn't think his figures were correct. Oh, ladies and gentlemen, some things hurt. The City of National City comes in here and says, "Why, I represent the people of the City of National City. We speak for the people of the City of National City." Well, ladies and gentlemen, I speak for the people of the City of National City, as he does, because the City of National City is a part of the United States of America. I speak for the people of the United States. And, ladies and gentlemen, in just a little while that voice of the people coming to you through me will be stilled—will be stilled—and then the burden which Bob and I have carried will pass from our shoulders to yours.

I am not going to take a great deal of time in under-[1171] taking to answer the statements that Mr. Martin made here with relation to his claim for the Tavares Construction Company. I am going to proceed

upon the theory and upon the basis that you, ladies and gentlemen of this jury, will listen to his Honor's instructions with relation to the law, and if he says to you that in arriving at your conclusion with relation to the award which you shall make to the Tavares Construction Company, you should not include therein any speculative or conjectural matters. I do not know whether I will be alive in 1950. I don't know what the situation may be. But I do know this—I do know this: that there never was and there never will be anything in that Exhibit W, which is in evidence and which you will have in your jury room that provides that the City of National City may have this property, or that the Navy Department may go on it and keep it until 1950 without it costing the City of National City something, and when I get into that, I will show you the cost.

May I tell you a story? I say that when the Tavares Construction Company undertakes to inject into this case a figure where they say that the price of this land is going to increase \$399.62 an acre—that is what they figure; maybe he didn't figure the 62 cents—and Mr. Martin said to you, ladies and gentlemen, the price of this land will increase \$399 an acre on the thirty-first day of December, 1949; that the price of this land will go up [1172] \$399. I say, "He went too far and he stayed too long."

There was a colored boy down in Oklahoma that was in the other war. He had been discharged. He came home. He met a gentleman on the street whom he had known before he went into the Army, and his friend said, "Why, hello, Rastus When did you get out of the Army?"

He says, "I just got out. I just got out of that Army, boss."

He said, "How did you like it?"

He says, "I didn't like it at all. I got court-martialed."

"You got court-martialed? What did you get court-martialed for?"

He says, "I don't know. I don't know,—something about a furlong."

He said, "It couldn't have been about a furlong. That isn't a military term. It must have been a furlough."

"No, sir. No, sir, boss. They said I went too 'fur' and I stayed too long."

"Now, Mr. Hindes of the San Francisco Bridge Company, we are now about to discuss the market value of the lands of the City of National City. Will you step up here, please, and I want to ask you two little questions, Mr. Hindes. We are concerned with what this land was before the government of the United States went in there and spent [1173] at least \$500,000 in improving it. What was it, Mr. Hindes?"

"Why, Mr. Landrum, it was nothing but mud flats."

Ladies and gentlemen, there is a man who went in there and for a company took a lease and started the improvement of parcel 7, and Mr. Hindes, when I asked him, "Mr. Hindes, what was it? Tell us now. You certainly are not interested in this law suit from that standpoint. What was it?" [1174]

"Mr. Landrum, it was mud flats." "And now, Mr. Hindes, you have a lease here." "Yes, sir. That lease, Mr. Hindes—" and I am talking about the Tavares Construction Company claim now— "That please, Mr. Hindes, carries within it a paragraph that it cannot be assigned or pledged without the written consent of the Defense Plant Corporation or of the Maritime Commis-

sion. Mr. Hindes, would you pay anything for a lease which you couldn't assign? Would you sign that lease?" "Why, no, Mr. Landrum; I wouldn't sign such a lease."

I give you that, ladies and gentlemen of the jury, on both claims, that you give to them some money for what they claim was a fee which they were to get for building a shipyard with government money upon which they could build ships at a profit and sell them to the government, and then ask you to give them \$500,000 on top of that. What was this land? What is this case all about?

The main contention of the City of National City is that they had something that no one else could get. Remember, in the beginning of the trial of this action, they had tidelands which were going into private ownership, and nowhere within the great State of California was there any such thing. Therefore, they said they were entitled to a large amount of remuneration because they had that kind of land. Do you remember that? In other words, they had a jewel of great value, a diamond in the crown. But, when George Schmultz and Charlie [1175] Shattuck and Tom Mason went on the witness stand and told you—and right here and now I want to pay to those gentlemen, and may I add I had the privilege of working with them for some time, my own compliments. I would like to stop and pin a little bouquet in the lapel of those men. You never, never, never will see five witnesses, and I will include the two gentlemen, and they are gentlemen, from the City of San Diego, my friends whom you saw, Mr. Goodwin and Mr. Cotton. To all of them I say "Cheerio and thank you." When the facts and the truth came into this lawsuit and Tom Mason went on that witness stand and told you of his knowledge and experience and told you of all of the properties that

he knew of, the Banning property—he named about nine or ten that he personally knew were in private ownership,

Then the jewel, the diamond, became paste. If that was not true, they had plenty of time to investigate and prove that it wasn't true. So the City of National City asked you to give them a lot of money. And when they asked you not to give the San Francisco Bridge Company much, "because you will have to take it out of what we get." And then they say, "Please don't give the San Francisco Bridge Company anything but give it to us because whatever you give them has got to come out of ours." And then they say as to the lease which was on Parcel 1, paying \$8,000 a year rental, that, because that was taken by Tavares and assigned to the Defense Plant [1176] Corporation, it has no value. You can't have your cake and eat it, too.

The San Francisco Bridge Company in this case is entitled to every dollar, every dollar that they are fairly and really entitled to, that they have shown by the evidence in this case that they should have. Mr. Goodwin says that, in his opinion, the San Francisco Bridge Company was entitled, and I don't want to misquote these figures because I fear that some of you may write them down and I will try to be as fair as I can in every way—Mr. Goodwin, ladies and gentlemen, the young man, and he is a fine, upstanding young man, isn't he, said that that contract, in so far as the San Francisco Bridge Company was concerned, should be \$45,750. Now, ladies and gentlemen, is this fair, am I fudging, when I say to you that that is the highest price that any one of the witnesses placed for the San Francisco Bridge Company? Mr. Cotton said \$18,800. Mr. Schmutz I do not remember but it was something like \$25,000. As counsel said,

"Your government and mine would like for you to give to the San Francisco Bridge Company the highest valuation placed by a government witness, the sum of \$45,750." And right here, can you tell me any reason on earth why the people of the United States would want to take from those people something and not pay them for it? Why the government has paid and paid and paid and paid and paid and paid and still wants to [1177] pay, and why would Mr. Goodwin come in here, ladies and gentlemen, and undertake to be in any way unfair?

And as to the lands, the total overall valuation, Mr. Goodwin is again high. So I say to you that I believe that I am entitled to be fair. We vouched for him. We placed him before you. We stayed behind him. And his figure as to the overall value was \$310,475. \$310,475 was Mr. Goodwin's overall valuation. From that, under the instructions which his Honor will give to you, you must set down how much you will take out for the San Francisco Bridge Company. In other words, it is what we call the unit rule. The government is taking the fee simple title to this property. You arrive at your first figure, which is \$310,000. That is the overall value, including everything, and then I apprehend that his Honor will tell you there that you will be required to take or to set out what you think, honestly and fairly and under the oath that you took, the San Francisco Bridge Company is entitled to.

Now, as to the Johnson parcel. You know, I have seen Mr. Johnson around the court room; I have seen him in the hall. He is an excellent gentleman. And the young man who represents him is a very fine, upstanding young fellow. There just isn't any question but what Mr. Johnson was receiving rental from that property due to what

counsel has talked to you about, due to the war. Yes, they did go in [1178] and pay Mr. Johnson \$40 a month, \$480 a year, but they did it because they needed that property in order to construct what? There has been a lot of talk around this court room about building ships, building ships, building ships. Yes, ladies and gentlemen; according to Exhibit W, they were building concrete barges, ships, concrete barges, to build concrete barges. Give Mr. Johnson what you think he should have. I say to you that it is my humble opinion and, if you don't agree with me, you may use your own judgment—as a matter of fact, I am no business man—some of you are—if you capitalize that rental, you capitalize something that was taken in order that something might be gotten to the windswept hills of Bataan.

Comparative sales, ladies and gentlemen, is the only way that I can see to arrive at a just verdict for the lands in this case, and Mr. O. W. Cotton, the man who made an appraisal on that property before this lawsuit was ever brought, told you what he thought it was worth. "Mr. Cotton, come up here, sir. What do you say?" "Well, I say \$3,225, Mr. Landrum." "Yes, but Mr. Cotton, wait. I promised myself when I started in the practice of law and when I took an oath in this court that I would be fair; that I would be just as fair as I could. Mr. Cotton, you are lower than Mr. Schmutz." "Mr. Schmutz, what do you say as to the Johnson land?" "Well, Mr. Landrum, I say that Mr. Johnson should [1179] have \$3,448." That is the highest figure placed here by any government witness, \$3,448.

And, ladies and gentlemen, you saw George Schmutz. You heard him tell you that he has appraised land all the way from Hoboken, New Jersey, to Honolulu and Pearl

Harbor. You heard him tell you that he had appraised land all the way from Houston, Texas, to Grand Rapids, Michigan. You heard him state his qualifications. You heard him state his opinion of the market value of these lands alone.

I haven't been a great deal concerned with what Mr. Johnson gets out of his holdings, nor have I been a great deal concerned with what the City of National City would get, nor have I been a great deal concerned with what the San Francisco Bridge Company would get, but I want to say to you, while we are sitting here talking, that I have been concerned with the question of how much the Tavares Construction Company was going to get at your hands. Whatever else may be said, Mr. Tavares is a capable business man. He cut himself in to this wartime Garden of Eden without the expenditure of a penny. He built concrete barges for the government of the United States at a profit, and now he asks you to put your hands into the pockets of the people of the United States and to give him a half a million more.

The Court: Pardon me, Mr. Landrum. If you want to suspend at this time, we will take our recess now. [1180]

Mr. Landrum: If your Honor please, if I may be permitted, I would like to finish. Mr. Clerk, I would like to have Exhibit Q, Exhibit W and Exhibits 2, 3 and 4.

Ladies and gentlemen, there was presented in evidence in this case Exhibit Q, Exhibit W, and Exhibits 2, 3 and 4. I have not had the least doubt as to what your verdict would be in so far as the Tavares Construction Company was concerned. I propose to discuss that claim with you not from the opinion of anyone. I will discuss with you

very shortly the opinions of the gentlemen who have appeared as experts. But I say to you that the claim of the Tavares Construction Company in this goes out the window by virtue of evidence which you can see, which you can feel, and which will stand out before you like the tall pines in the forest of truth. Every claim that it has in this lawsuit stems from Exhibit W. I say to you that, in reading that document, if you can tell me what it means, then you are probably a better man than I am. I tell you that, if the lawyers can agree on what that document means, they are better lawyers than I am. So, therefore, their rights stemming from Plancor 407 are what you are to determine.

Ladies and gentlemen, it has appeared to me that in the trial of this action the other side has been doing what I say is, in the parlance of the street, straining at a gnat and swallowing a camel. We don't have to build shipyards. We [1181] don't have to depreciate this thing and dream a dream of what might happen in 1950. I will probably be dead, buried and forgotten by that time. But, if you will go with me through Exhibit W, and then can say that you believe that, in the 23rd day of December, 1944, any man would have bought that instrument, and paid its market value as they have contended for, I will be unable to follow you. What could they have gotten for it on the open market for cash on the 23rd day of December, 1944; what would a willing buyer have paid for the instrument attached there to the original, which said, "For and in consideration of the sum of \$1.00 and other valuable considerations, I hereby grant, bargain and sell unto John Jones, all my right, title and interest in and to Exhibit W"? That is the question. It is not how much it would cost to build a shipyard. It is not

how much it would sell for at its depreciated value. The fair market value of a leasehold is what that leasehold in its entirety would have sold for on the open market on the 23rd of December, 1944. In other words, what would a willing and informed buyer have paid for an assignment of that instrument.

Ladies and gentlemen, I don't want to take too much time. I know you are getting tired listening to me. You have been so kind, though, that maybe I can help you just a little.

Paragraph Nine says, "No salaries of lessee's executive officers, no fees of its attorneys, no part of the expenses [1182] incurred in conducting lessee's offices and no overhead expenses of any kind shall be included in the cost of leasing the site or of the programs, except that direct expenses of lessee's officers or employees and fees of attorneys retained or employed by lessee in connection with the programs may be so included to the extent approved by Defense Corporation."

Then, ladies and gentlemen, take with me Exhibit Q and you will find over \$200,000 in there covering what they term to be service charges. And you will remember the testimony in this lawsuit that at least the salary of Mr. Tavares for some time was paid. You will remember from the testimony that they paid for the vacations of their office force, or whoever it was. You will remember they paid \$26,000 for engineering and said they did the engineering themselves. Ladies and gentlemen, suppose that you came to me and said, "Here, Gus, I want to sell you this thing." Well I would say, "Listen, did Tavares follow the terms of that contract? Did he pay salaries? Did he pay overhead? Did he pay for the vacations of these clerks?" "Yes; he did." Well I would say, "They

might cancel that contract." I don't know. And then, in that paragraph Twelve, about which you have heard so much, and let us be very careful here, there is one word that occurs in this contract that I want to let remain forever green in your minds and memories. [1183]

On the second page of paragraph Twelve, it says, "This lease or any extension thereof under this paragraph Twelve may be terminated by the parties hereto in the manner hereinafter set forth. At any time when substantial use by lessee of the site, facilities and machinery shall be no longer required to enable lessee to construct—" not repair—"to construct boats for the government." That lease, ladies and gentlemen, could be cancelled by either of the parties when the substantial use of this property was no longer required to construct boats for the government.

Paragraph Thirteen provides that "as rental for the site, facilities and machinery (in addition to the rental for the site which lessee leased from National City, California, all of which lessee agrees to pay during the term of the lease), lessee agrees to pay to Defense Corporation \$83,327 for each boat delivered to the government under or pursuant to its contract for the construction of five concrete barges or any other contract with the government for the construction of boats; said rent to be paid as each boat is delivered to and paid for by the government."

But, after he was paid for the entire construction, he was to have the use of these facilities for the construction of boats, for the government, without rent. I am trying to be fair. After he had paid the entire amount, in other words, after he had built enough boats that the government [1184] could take the amount it had paid for the

construction of the facilities, then, when he constructed boats after that, he didn't have to pay any rent. Now, they claim that is a valuable right.

And then paragraph Fourteen says that the Defense Corporation may cancel this lease, or any extension thereof, "in the event (a) all or substantially all of lessee's contracts with the government, at any time outstanding, for the construction of concrete barges and other boats shall be terminated or cancelled prior to completion, or (b) the government shall request priority for itself or others with respect to the use of the facilities to be provided hereunder."

Now, of course, in order to be entirely fair, we don't know why either one of these parties didn't serve a notice of cancellation but we do know that the Navy Department had told Tavares before this action was brought that they were going to take it over because they asked him, "How much do you want?" And not only that but the very Exhibit W itself, in a further paragraph which I will read to you, says that it is contemplated that it will be taken over by another branch of the government. And I want to say to you that, if it was taken over by another branch of the government, it is my construction of that exhibit, which isn't Mr. Martin's, that, if it was terminated by virtue of that clause (b), if the government requested priority for another branch of [1185] the government and Tavares refused to give it, his option never came into being because he could only acquire that option by virtue of two clauses, and that isn't either one of them.

Now, I don't think there is need for us to waste a great deal of time in talking about how much he would have to pay if he exercised the option, when you and I

know what this case is about. It is simple. It is simply this: How much could you get for that paper, if you assigned it, on the open market, as it stands. All right. Then it provides that, if this notice is given, they shall have a right to negotiate and have a right to look over a man's shoulder. Ladies and gentlemen, this is a free country, a free United States. We all have a right to negotiate, and, while we do not have a right to look over someone's shoulder, yet, at the same time, I am not so sure that there ever was going to be any other man's shoulder there because the Navy Department said what they did.

Paragraph Sixteen provides, "So long as this lease remains in full force and effect—" 1950, ladies and gentlemen?—"So long as this lease remains in full force and effect, lessee shall procure and maintain at its cost—" that is, Tavares—"insurance on the facilities."

I make this pointblank statement. I find no place in Exhibit W, not one single word, which leads me to the con-[1186] clusion that that was ever given to them as any fee for supervising the construction of a shipyard with someone else's money, with which they were to build ships. Maybe I am wrong. I want you to look for that. See if you can find in Exhibit W any statements to the effect that that is true. When you write a contract with a man, when you sign a deed with a man, it reads like this, "For and in consideration of the sum of \$1.00 and other valuable considerations." If they were to receive that for their fee for supervising the construction of a shipyard with someone else's money, with which they were to build ships, why isn't it incorporated in the paper?

Now, dwelling on this 1950 proposition, "Lessee agrees to pay to the proper authority, when and as the same be-

come due and payable, all taxes, assessments and similar charges which at any time during the term of this lease or any extension thereof may be taxed, assessed or imposed upon Defense Corporation or lessee with respect to or upon the site, the facilities, or the machinery, or any part thereof, or upon the occupier thereof, or upon the use of the site, facilities or machinery. Lessee—"Tavares—"also agrees to pay all claims or charges for or on account of water, light, heat, power, and any other service or utility furnished to or with respect to the site, the facilities or the machinery, or any part thereof." [1187]

Ladies and gentlemen, if that lease and that option was to continue in being until the 31st day of December, 1949, and Tavares was not using it, someone else was, he was not constructing concrete boats for the government, then that lease would have been a liability rather than an asset, because it would have cost him all of that money from year to year to sit there and wait there. If that is not true, counsel who follows me for the Tavares Construction Company will point out to you that isn't true. I say to you that under the terms of this agreement, if it was kept, and you speculate, you dream a dream that this land is going to increase in value at \$399.62 an acre up to 1950, then you take this agreement, you take it and tie it right into this agreement and find out by the two of them how much more it would cost Tavares to sit there and wait until 1950.

All right. Here is the thing that Mr. Hindes said was such that he never would have even signed this lease in the first place.

"Twenty-two:"—no, I beg your pardon. That is wrong. That is not the assignment clause. Mr. Hindes did not discuss this clause.—

"Twenty-two: Lessee may use such Site, Facilities and Machinery only for the construction by Lessee of boats for sale to the Government, unless otherwise permitted, in writing, by Defense Corporation with the consent [1188] of the Maritime Commission noted thereon."

"Twenty-four: Lessee will not without prior written consent of Defense Corporation and the approval of the Maritime Commission sell, assign, or pledge this lease or any of its rights or obligations hereunder, or sublease or permit the use by others of any of the property covered by this lease."

Mr. Willing Buyer, I want to sell you this lease. I want to assign it. I want to sublet a part of it to you. What will you give me?

"Why, Mr. Tavares, you can't do that without you get the consent of the Defense Plant Corporation and the Maritime Commission. I wouldn't give you five cents for it. How do you know that they are going to let you make a profit on this paper? Is it reasonable to suppose after they put up for you \$2,700,000 and build you a shipyard, that they will permit you to go ahead and sell this paper? Do you not know that on the date of this lease it is indicated that the Navy of the United States proposes to take over those utilities?"

Mr. Tavares told me that he thought that he could get the consent of the Defense Plant Corporation and the Maritime Commission for him to make another half million dollars.

Now, here, paragraph Twenty-six:

"It is contemplated that the lease of the [1189] Site, Facilities, and Machinery to be provided hereunder may be transferred and conveyed to another branch of the Government."

I say that under your option clause, which is paragraph 15, if that should occur, and they say it is contemplated,—if that should occur and Tavares refused to give that consent, that he would not have been entitled to his option.

Now, I said that by actual real evidence I would show you by something that, as they say, you can put your teeth into that the claim of the Tavares Construction Company in this case should not be allowed. What they are actually doing, ladies and gentlemen, is coming into a condemnation case and trying to get damages against the government of the United States for what they claim is a violation of that contract.

Now, Exhibit W, which is the contract, take that and take Exhibit Q, which is the figuring, and you will find the very first item that the government paid was that they paid Tavares back all that that lease that he got from National City cost him. They paid him for it, and you will find that to be the first item set up.

Now, what is it that I have said to you would prove this case outside of the expert testimony? It is those two exhibits. You take them, tie them in with these three exhibits, and then you will bring in a verdict for nothing [1190] for the claim of the Tavares Construction Company.

The first one of these letters is dated November 21, 1944:

"With reference to our recent telephone conversation, regarding our disposition of the option given us by the Defense Plant Corporation for and in consideration of the construction"—for and in consideration of the construction—"of the facilities under Plancor 407, please be advised as follows:"

There isn't a single word in Plancor 407 that said it was for and in consideration of the construction of the facilities.

"The Tavares Construction Company, Inc., retains an option under an Agreement of Lease with the Defense Plant Corporation for the purchase or acquisition of the facilities of this shipyard on a depreciated basis. This option is in the form of compensation for having constructed approximately \$2,-700,000 worth of facilities without profit, and we consider this option of some value."

Of some value. That, ladies and gentlemen, was written before this law suit, before December 23, 1944, and all they said was: We are entitled to some consideration because we built a shipyard with your money, to build ships and sell [1191] to you, and we didn't charge you anything for supervising the building of our own shipyard. (Continuing)

"It is not the intent or desire of this company to in any way stand in the way of the acquisition of this property by the U. S. Navy."

Now, they knew, therefore, on the 21st day of November, 1944, that the government was going to request pri-

ority for the Navy Department, and this Exhibit W says in one of those last paragraphs that it is contemplated they do that. All right. (Continuing)

“—but we are of the opinion that we are entitled to some consideration.”

Ladies and gentlemen, you are not going to give them more than they asked for, are you, before this law suit was brought? And don’t forget, that that was only their asking price then.

“We will, if desired, further discuss this matter with you at your convenience.

“Very truly yours,

“CONCRETE SHIP CONSTRUCTORS

“R. S. Seabrook.”

Now, ladies and gentlemen, that was followed by a letter here of November 24, 1944:

“Eleventh Naval District

San Diego 30, California [1192]

“Attention: Capt. F. P. Conger, Industrial Manager

“Gentlemen:

“In explanation of our letter of November 21, 1944, and in compliance with Capt. F. P. Conger’s request, we wish to be more specific regarding the considerations for our release.”

In other words, here is what we want now, if we turn that lease and option over to you.

“These considerations are as follows:

“1. To permit this company the free use of existing facilities to complete necessary war contracts.”

Ladies and gentlemen, they got that. If they had not, they would have come in here and told me they didn't.

"2. To permit this company the free use of facilities to carry on ship repair work for Governmental Agencies until such time as the Navy needs to convert these facilities to other purposes."

Well, you heard the way they did complete those two barges, didn't you? They got that. If they hadn't, they would have come in and told you they had those two barges—you remember they only had one more contract left—that they had two more barges to complete. And I believe I am right when I tell you that the testimony of their own words were that they had the use of this thing for the completion [1193] of these barges and didn't finish them until May 10, 1945. They got 1. They got

2. All right.

"3. To give this company a contract for the construction of the necessary Navy alterations to convert property to Navy requirements."

I don't know. I don't know whether they were offered that contract or not. But they said that if we don't get a contract to fix it up with the Navy, then you:

"Make payment to this company in the sum of 3% of the facilities constructions costs, or \$80,000, which is equivalent to a minimum construction fee for constructing the facilities.

"For your information, no fee or profit was allowed us for the facility construction, but in lieu thereof we were granted an option to purchase and the use of the facilities."

Ladies and gentlemen, on the 24th day of November, 1944, they say, "We want you to give us \$80,000 for supervising the putting in of the things you bought for us to make ships with to sell to you. We want you to give us \$80,000."

You will have these papers. If that isn't right—if what I have read to you isn't right, throw me out the window. But, my goodness, are you going to permit those people to go into the treasury of the United States, when we come in here in a condemnation case, and get any more? [1194]

Well, if you think they are entitled to that, you give it to them. But if you think that it would be right for me to say to you, "I want to get some money out of this war business. I want you to spend \$2,700,000 to build me a shipyard to build concrete ships to sell to you at a profit, and then after it is all through and done, I want you to give me \$80,000 for building my own shipyard, and supervising that, and then on top of that I have taken the expenses, I have taken the vacations for my own office force."

Now, ladies and gentlemen, we will go for just a few moments into these figures. Here is an exhibit that proves that if they did exercise their option, or if this thing would stay there and wait for them until 1950, it wouldn't be worth anything anyway. And it is right in their own letter. You don't need anybody to get up before you and figure depreciation. You don't need any expert to get up and tell you, in his opinion, that those facilities would not be depreciated very much, that they would be worth more money than that depreciated value set forth in Exhibit Q. You don't need anybody to get

up here and express to you an opinion that Tavares would not have had to pay rent had he used the facilities after December 22, 1944. You don't need anyone to tell you that the use of this shipyard for the construction of concrete ships was practically over. It is here in black and white, every one of those questions. [1195]

Now, let's see:

"Mr. Byron Howells,  
Defense Plant Corporation,  
316 Pacific Mutual Building,  
Los Angeles, California

"Dear Mr. Howells:

"In furtherance of the enclosed, and in response to your telephone call of even date, this Company has entered into Master Repair Contracts with both the U. S. Army and Navy."

Gentlemen, hadn't they received No. 2 of this one, that they were permitted, they did have contracts for the free use to carry on ship repair work.

"The billing rate, as provided for by these contracts, does not include an amount for the rental of the facilities as they are Government-owned. In accordance with the enclosed, we request permission for the use of these facilities in this connection without charge.

"In addition to this work, we are occasionally called upon to repair vessels other than Government-owned."

They were using the facilities which were purchased by the money of the people of the United States to engage

in private repair work for private individuals and asking you to come in here and give them a half a million dollars. [1196]

"for the purpose of payment to the Government for the use of these Government-owned facilities, we have, in the past, accrued an amount of 10¢ per direct man-hour worked."

There it is. They would have had to pay 10 cents per direct man-hour worked as rental to the Defense Plant Corporation for the use of these facilities.

"To date, these accruals have amounted to \$2,806.86."

They owed rent on this date for the use of these facilities of \$2,806.86 for using them to do work that they were paid for by private individuals.

"The determination of the 10¢ per hour to be charged was made after reviewing direct man-hours consumed in connection with the shipbuilding program.

"The yard was constructed to employ 4,000 workers. During the year 1943, 7,283,000 direct man-hours were used in connection with the construction of the concrete vessels. This year represented,"—1943 they are talking about—"more nearly than any other year, the normal expected employment for the yard if sufficient business was at hand. Facilities cost the Government approximately \$2,750,000, including interest, [1197] and this amount depreciated on a fifteen-year basis for the year of 1943 would amount to 0.025¢ per direct man-hour worked. With

this in mind 10¢ per direct man-hour appeared to be adequate compensation for the use of the facilities for other than government work."

Now, ladies and gentlemen, there it is in plain language, that they were going to pay to the government 10 cents per direct man-hour after December 23, 1944, if they used them for anything other than for the construction of boats for the government. So if they want to wait until 1950, if they use it, they are going to pay 10 cents per man-hour, and if they don't, they are going to have to pay taxes, and everything.

"The following tabulation sets forth man-hours and depreciation per direct man-hour, by years, for the years 1942, 1943 and 1944, and the average depreciation for the three-year man-hours.

	<u>Total Direct Hrs.</u>	<u>15-Year</u>
"1942	1,534,000"	

In other words, in 1942 they were just getting started, 1,534,000.

"1943, 7,283,000," direct man-hours. A jump from 1,534,000 to 7,283,000. In 1943 they were making full use of the facilities, building concrete barges or boats. [1198]

In 1944 (estimated), and this letter is dated December 12, 1944, so they must have meant for the balance of the year, and we haven't a record. 1944 (estimated) 2,742,000. In other words, it was all over. They only used them 2,742,000 man-hours in 1944, while they had used them 7,283,000 direct man-hours in 1943. In other words,

the work in that yard had dropped off two-thirds in 1944 according to their own written letter that you will have.

"You will note that this average amount is only 7¢ well beneath the 10¢ allowed."

In other words, depreciation, depreciation. They talk about depreciation. Counsel got up here and talked and said that this property would be worth more money in 1950, that it would not depreciate, it would be all right. But, good. Here is their own statement as to how much it would depreciate. You add 1,534,000 and 7,283,000 and 2,742,000, and you get about 11,000,000 direct man-hours. Now, if they say, and as they do say, that that depreciation should be figured at 7 cents per man-hour—they say it right here in black and white—11,000,000 direct man-hours at 7 cents per man-hour is \$770,000 depreciation, which they themselves say. Look at it. In this exhibit it is figured about 600,000 and some odd dollars, but in their own letter it is more.

Now, ladies and gentlemen, do you need any experts? [1199] There it is, in their own language. There they pay 10 cents direct man-hour rental, and they say the depreciation is 7 cents per direct man-hour. And here:

"In view of the foregoing, we request that permission be granted to continue the practice of accruing 10¢ per direct man-hour worked for repair work other than Government or Governmental Agencies, for payment to the Government as rental of facilities."

Ladies and gentlemen, it is my very, very, very earnest contention that if they continued this dream over

until 1950, that if they used the facilities they would have had to use them for private work, and they would have had to pay 10 cents per direct man-hour as rental, and they would not have any free rent; but if they didn't use the facilities under the contract which they had they had to pay all the maintenance, the taxes, the insurance, the guards, and they are sitting there putting money out, and taking nothing in for a period of five years, and then they ask you to speculate, they ask you to bring in a verdict for them based upon conjecture.

The Court: Mr. Landrum, I think we had better take a recess. The jury has now been sitting over an hour.

Mr. Landrum: Yes, sir.

The Court: Ladies and gentlemen, we will take a recess for 10 or 15 minutes. Remember the admonition.

(A short recess was taken.) [1200]

The Court: All present. Proceed.

Mr. Muir: May I approach the bench, your Honor?

The Court: You may.

(The following proceedings took place without the hearing of the jury:)

Mr. Muir: We wish to get into the record a stipulation between the defendant National City and the defendant Leonard McLaughlin, which stipulation I will reduce to writing during the lunch hour.

The Court: Mr. McLaughlin is here, isn't he?

Mr. Muir: Yes. He is approaching the bench now, your Honor.

The Court: Mr. McLaughlin, this concerns your interest here about the lease that you had. You have no attorney and you are appearing here yourself?

Mr. McLaughlin: Yes, sir.

The Court: Very well. The City has proposed some sort of a stipulation here.

Mr. Muir: This covers the leasehold interest known as Parcel No. 8 and, out of the award of the City, there is to be allowed to Mr. McLaughlin the sum of \$40.

The Court: \$40? Is that what you are to get?

Mr. McLaughlin: Yes, sir. That is from the lessor.

The Court: Altogether?

Mr. McLaughlin: Yes, sir. [1201]

The Court: And that is all?

Mr. McLaughlin: Yes, sir.

The Court: Is that satisfactory?

Mr. McLaughlin: Yes, sir.

The Court: Very well.

Mr. Sloane: May I explain this, your Honor? I don't want to be captious on this matter of a divided verdict but I think that a fair verdict possibly would be to divide it up as to time.

The Court: Have you received a copy of this proposed instruction, Mr. Landrum, on behalf of the San Francisco Bridge Company?

Mr. Landrum: No, sir; I haven't.

The Court: The record may show that, during the argument for the plaintiff and when the argument had resumed, counsel for the San Francisco Bridge Company, for the first time, proposed an additional instruction. Without stating that the instruction will or will not be given, I want the record to show that the instruction was proffered, for the first time, at this hour. The court is of the opinion that it isn't timely perhaps but it

will be considered instruction and the decision thereon will be embodied in the instructions given to the jury. I think you should give Mr. Landrum a copy.

Mr. Sloane: I have given it to his associate. [1202]

Mr. Landrum: Could I ask one question, your Honor? I would like to know if it is your Honor's purpose to charge the jury this afternoon, in case we get through with our arguments by 3:30. In that case, I can leave tonight.

The Court: If the case is ready for submission by 3:00 o'clock. Otherwise, of course, we can, by stipulation, permit the jury to go home but it must be by general stipulation. There are no facilities here to keep the jury here at night, particularly with men and women on the jury.

Mr. Landrum: If your Honor please, if I am successful in having the other gentlemen stipulate with me, so that I may go home tonight, that will permit me to leave.

The Court: I wouldn't want the jury to go home if the court instructs them by 3:30. I would expect them to proceed with their deliberations until the dinner hour, and then, by stipulation, they could come back tomorrow morning at 9:30. Is that satisfactory?

Mr. Sloane: That is entirely satisfactory.

The Court: There are no facilities to keep juries here at night. If everybody agrees to a stipulation that the jury may go home, to their respective homes, tonight, under the admonition of the court, if they haven't reached a verdict by dinner or by such hour as the court will have concluded, they may come back tomorrow morning and resume their deliberations? Is that satisfactory? [1203]

Mr. John M. Martin: That is perfectly agreeable with me, your Honor. Do you plan to instruct them this afternoon?

The Court: I think so.

Mr. Monroe: That is agreeable, your Honor.

(The following proceedings took place within the hearing of the jury:)

The Court: All present. Proceed. Now, Mr. Landrum, you may proceed with your argument.

Mr. Landrum: Yes, your Honor.

Your Honor, and ladies and gentlemen of the jury, I now come back to resume with you, for a few more moments, this little talk we were having, in an effort to clarify for you this case. I want to say at this time that there is on file in this case a stipulation which provides that the Tavares Construction Company and its co-adventurers, on the 23rd of December, 1944, had a valid and existing option. I want to say we have also agreed that they received no fee, no private fee, for the construction of these facilities except as it might have been reflected in Exhibit W. That has been agreed to. I want to get that entirely clear.

Now, ladies and gentlemen, I have been discussing with you the real evidence, something that, as I said to you before, you can take and see and feel. I want you to do that, take these instruments, these five exhibits. And, ladies and gentlemen, it is my very, very earnest conviction that, when [1204] you have done that, you will say to the people of the United States, "We do not feel that we are going to take any of your money to give to the Tavares Construction Company."

Ladies and gentlemen, as I said to you in the beginning, this burden has been upon me. It will pass to you. You

do whatever you think is right, right and just. Be fair and be just and then I will smile with you, whatever it may be. But I said to you that this contract was shot through with speculation and conjecture. I earnestly feel that there hasn't been a single question asked on cross-examination by counsel for the Tavares Construction Company that didn't prove that fact. And I go further to say that Mr. Martin's argument proved the fact that it was shot full of speculation and conjecture from one end to the other, when he made the statement that the price of this land would increase to \$399 each day for a period of five years. That is pure speculation and conjecture.

Now, let's sell this instrument; let's go and sell this instrument. They have had Mr. Hotchkiss and these other gentlemen here presenting to you evidence going to the question of selling it. Don't forget that the willing seller is not the only one to be considered in arriving at fair market value. The buyer himself also must be taken into consideration. So that buyer would look for and say, "Well, I understand, under Exhibit W, if they do take this option, they will have to pay the cost of the land to the government. Mr. [1205] Seller, how much is the land going to cost?" "I don't know; I don't know." That depends upon the verdict that you ladies and gentlemen bring in. So I, the buyer, and the buyer is the government of the United States, say, "Well, now, first, Mr. Seller, how much are they going to have to pay for the land?" "I don't know." "Now, Mr. Seller, this contract here provides that they may request priority for some other branch of the government. Do you think that they may request priority for some other branch of the government? You are asking me to pay you money to

assign this to you. Do you think they are going to request priority for some other branch?" "I don't know." "Mr. Seller, this contract provides that it is for the purpose of building concrete ships for the government. Can I build concrete ships for the government? You are asking me to pay you money. Can I build concrete ships for the government?" "I don't know." "Mr. Seller, it appears that this shipyard was built for a specific purpose, to build concrete ships for the government. I am wondering whether or not, if I buy it, the war will last sufficiently long and the demand for concrete ships will be sufficiently great that I may use it for the purpose set forth in Exhibit W. Mr. Seller, how long is the war going to last?" "I don't know." "Mr. Seller, you tell me that I am going to get some advantages that no one else can have; that I am going to get the diamond, the jewel in the [1206] crown and, if I get it, I can borrow on it. No one else could borrow money. Mr. Seller, can I borrow some money?" "I don't know." Ladies and gentlemen, "I don't know" is the answer. It is speculative and conjectural from one end to the other unless a buyer could know how much he was going to have to pay, unless a buyer could know he was going to get a contract with the government. They had fulfilled all of their contract except for two barges they had to deliver. Unless a buyer would know how much he could sell this property for, he wouldn't pay one cent for it."

I am not going to take any more of your time. I feel I have been as honest and fair as it has been possible for me to be. I want you to know I consider it a great honor to have the long experience I have had. I entered the Department of Justice in 1909. I am proud of it. I have grown old and tired. I want to go home. But this

Tavares claim hurts me. So I have done the best I could. Now I feel that I can leave here happy and glad. I feel that whatever you do will be right and then I feel that we have all done a good job. I will be followed by some of the other gentlemen. They have been very kind to me in the trial of this case. You give to them the same fair consideration that you have given to me. Listen to them. You have been very kind. If, after my voice is stilled, they make some statements which you feel that I would have liked to have answered [1207] had I been here, you answer them for me and answer them the way you think they should be answered.

As I said to you, the voice you hear now is almost through. So do whatever you think is right. Give them every dollar to which they are entitled but not one penny more.

Ladies and gentlemen, in behalf of those who work with me and for myself, I thank you very, very much.

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[Closing Arguments to the Jury on Behalf of Defendants. Not printed.] [1208]

Mr. Muir: Pardon me, your Honor.

The Court: Yes.

Mr. Muir: May I present this stipulation? This is the written stipulation which covers the oral stipulation.

The Court: Yes, you may present it. It will be approved at the appropriate time.

## INSTRUCTIONS TO THE JURY

The Court: Ladies and gentlemen of the jury, you are instructed as follows: The Court will now give you instructions as to the law to be considered by you in arriving at the fair market value of the respective properties and property interests that are involved in the proceedings which have occupied your careful, patient and considerate attention for approximately the last two weeks.

The Court does not instruct you and has not intended to instruct you upon the facts of the case or upon what inferences you as jurors are to draw from the facts as you may find them from the evidence that has been presented by the litigants in this action. You are the sole and exclusive judges of the value and effect of the evidence, as well as the sole and exclusive judges of the credibility of all witnesses who have testified in the proceeding. You should weigh and consider all of the evidence without passion, prejudice or sympathy.

Your oaths require that you accept without reservation [1245] or question the law as is stated in the instructions which are now being given and which have from time to time during the progress of the trial been given to the jury upon appropriate and applicable situations as to the manner in which you should receive certain lines of evidence which were being elicited at such times. It is not inappropriate to remind you that you have no right to consider or apply any law to this proceeding that is not embodied in the Court's instructions, and no other view or opinion as to the law than such as is stated by the Court in its instructions to you is to be considered or applied by you as the law which may govern your deliberations and decisions in this action. Of the facts,

however, as before stated, you are the sole and exclusive judges.

The phrase "just compensation" has been used frequently throughout the trial and it will be repeated throughout the instructions. You are to accept the meaning and scope of such term as interpreted and stated by the Court in the instructions, and you can not set up or construct any other meaning of the term "just compensation" than that stated by the Court in the instructions.

You must confine your deliberations and base your findings and verdict in this case upon the evidence that has been presented in this case during this trial, and such inferences as you as jurors may deduce therefrom, and upon the law as given you [1246] by the Court in the instructions. All other matters, situations, sentiments or ideas must be left out of your minds and eliminated from your decision in this case. All of the litigants, without discrimination, partiality, or favoritism, are to be treated fairly and justly under the evidence and law, and when you as jurors shall have reached decision solely on such bases you will have adequately and completely performed your duties in this case.

Each juror must decide the case for himself or herself, respectively, but all jurors should deliberate and consult with one another with a view to reaching an agreement, if such can be accomplished without violence to individual judgment, upon the evidence in the case and the law as stated by the Court in the instructions, and no juror should hesitate to change his or her views or opinions when convinced by the evidence that such views or opinions are erroneous. There should be no pride of intellect which should restrain a juror from acting in

accordance with his or her conscientious judgment under the evidence in the record and the law as stated by the Court in the instructions.

This is a proceeding brought by the United States of America to condemn certain pieces of land lying and situate in the County of San Diego for use by the Government of the United States. The Government of the United States has the power known as the power of eminent domain by which it may [1247] condemn and take property for public use upon payment to the owners of such property of just compensation.

The lands involved in this proceeding are real property and lands generally known as tide and submerged lands bordering on San Diego Bay and extending to the pier-head line as established by the Federal Government. The property of defendant National City involved consists of eight parcels, description of which has been given to you and which are referred to as follows:

Parcel Number One, approximately 18.37 acres

Parcel Number Two, approximately 4.40 acres

Parcel Number Three, approximately 34.02 acres

Parcel Number Five, approximately 1.03 acres

Parcel Number Six, approximately 1.23 acres

Parcel Number Seven, approximately 6.26 acres

Parcel Number Eight, approximately 0.26 acres, and Area A, approximately 30.92 acres.

There is also involved in this proceeding land owned by Carl A. Johnson and wife, and known as Parcel 9, approximately 1.02 acres. As to Parcel 9 you will make a separate award from the lands of the other defendants.

The party having the burden of the proof of an issue is required to establish it by a preponderance of the evidence. The burden of proving the market value of the property taken rests respectively upon the defendants, respectively. By [1248] preponderance of the evidence is meant the greater weight of evidence, or that evidence which preponderates over or is more than or is greater than the evidence offered in contradiction thereof. The term has to do with the weight or probative value of the evidence and not necessarily with the number of witnesses testifying on behalf of either of the parties. It thus sometimes follows that the testimony of a greater number of witnesses which does not produce conviction in your minds may be overcome by the testimony of a lesser number of witnesses, or of one witness, which does produce conviction in your minds. In this connection, however, in determining the market value of the property it is for you as jurors to weigh all of the evidence and from all of the evidence introduced before you determine for yourselves the actual market value of the property at the time of taking; and it does not necessarily follow that it is necessary that any witness may have testified to the exact value in dollars and cents determined by the jury to be the actual market value. You are of course required to consider and give due weight to the testimony of all of the witnesses. But after weighing all of the testimony offered by all parties it is your province as a jury to ultimately determine for yourselves the actual market value of the property and the amount to be awarded to the defendants. [1249]

The law recognizes that in determining the fair market value of property it is not possible to make such determination with absolute accuracy in dollars and cents or

by manner of computation. The determination of the reasonable market value becomes largely a matter of opinion. Although the ordinary witness is not permitted to express his opinion but must confine his testimony to matters of fact, nevertheless, as to the matter of value, witnesses duly qualified by training and experience are entitled to testify as to their opinion. You are required to give due consideration to the opinions expressed by such expert witnesses. You are not bound to accept the opinion of the witnesses offered by either party but it is your province to pass upon the testimony of such witnesses and accord to the testimony of each witness the weight to which you deem it to be entitled. In so doing you may consider the bias or prejudice of such witness, if any has been shown, his opportunity for observing, the experience and qualifications of the witness, the reasonableness or unreasonableness of his testimony, and the facts and matters upon which he has shown his opinion to be based. It is for you to determine, therefore, the weight to be accorded to such opinions and to consider all the facts, circumstances and conditions which have been shown to affect the values of the property and from all of these things to arrive at a determination of the amount to be [1250] awarded to the defendants, respectively.

In this connection there has been introduced evidence concerning the sale price of other property in the general locality, evidence of the peculiar adaptability of the property for certain uses, and evidence of the location of the property and its location with respect to other things, its soil and its general characteristics. None of these elements should be taken by you, standing alone, as being determinative of the question you are called

upon to decide. The real question for your determination is the market value of the property at the time of the taking. All of the various elements shown by the evidence are to be considered by you insofar as it is shown that such elements affected the market value of the property. With regard to any use for which the property may have been peculiarly adapted, you are not to fix a value as though it were then being used for that purpose but you are to take that adaptability into consideration and fix the market value of the property by reason of the fact—if it be the fact—that it was peculiarly adapted to such purpose.

Further considering the matter of market value, you are instructed that in determining such value you are to take into consideration all of the physical characteristics of the property and all things which reasonably tend to increase or diminish its sale value or market value. You [1251] are to determine and award to the defendants as the market value of the land that price which they could reasonably expect to have received for the property in a sale upon the open market; and in determining that price or value you must take into consideration all purposes for which the land was suited or adapted and must consider the highest and best use to which the land might reasonably have been put. In this connection you are to take into consideration the areas of the land, its accessibility to highways, its character with regard to soil and drainage, whether it is reasonably level or otherwise, and any peculiar or particular purpose to which it might be put by reason of its character or location. You may also take into consideration the character of the property as to whether it is accessible to railroad facilities and whether its character as tidelands

fronting upon San Diego Bay make it accessible of use for wharves, docks or similar structures.

In determining the fair market value of the lands taken in this case you will not permit yourselves to be influenced by the character of the petitioner as the government of the United States, nor the character of the defendants as private individuals, counties, cities or states. You must treat this case exactly as you would a case between private parties.

You should give no consideration whatever to the [1252] willingness or unwillingness of any or all of these defendants to have the Government take this land or any interest therein, if any such there be. The sovereign Government has the absolute right to take this property for the public.

In eminent domain proceedings any increase in value by the proposed improvements planned by the Government cannot be considered. So, in determining the value of the land, you must not take into consideration what its worth would be after the Government has erected buildings or made other improvements.

The amount is not what estimate does the owner place upon the lands nor what they are worth to the taker, the United States. You should not take into account any special value that their use may have to the United States, but what is their market value, what price would they bring in the market. When the property is taken for a public use, the owner is only entitled to receive the amount of its market value. Market value does not depend in any degree upon the owner's will.

You have been cautioned that in determining the fair market value of the property you are not to award any

special value which the United States intends to make of the property but are to consider those uses to which the property is reasonably adapted. Should it develop or should you believe that the use to which the government intends to put the [1253] property happens to be the use for which it is suitable and adaptable then you may, of course, fix the market value with reference to the use to which you find it adapted. In determining this market value you are also to disregard any special value of use to the owner. You will likewise disregard any agreements between the state and the city limiting the uses. The law provides that when property is taken in a proceeding of this nature just compensation, measured by the fair market value of the property, is to be awarded. Market value is the test by which you shall determine your award. [1254]

Just compensation in this case is the fair market value of the property as of the dates as given in the instructions. It is not the value as of today. It may be worth more as of today and it may be worth less.

The question of the amount of compensation to be awarded to the respondents is not a question of what the property taken would have been worth to them if they had retained the property taken, because it may possess a greater value to them than it had on the open market. The question for you to consider is this—if the defendants had desired to sell the property taken from them by the government, what could they have obtained for it upon the market, being allowed a reasonable time in which to find a purchaser who was buying with a knowledge of all the uses and purposes to which the property was adapted?

In determining the value of the lands which in this case have been taken for public use, the same considerations are to be weighed by you as in the case of a sale of property between private persons. The inquiry in the case must be: What is the property reasonably worth in the market, viewed not merely with reference to the use to which it was put at the time this action was begun, but with reference to any and all uses to which it was reasonably and practically adapted within the reasonably near future.

In determining the fair market value of lands taken, [1255] the just compensation to the owner is that sum of money which, considering all the circumstances disclosed by the evidence, could have been obtained for the lands by an informed seller offering them in the open market for cash. It is the amount that in all reasonable probability would have been arrived at between an informed owner, willing, but not compelled to sell, and an informed purchaser, willing, but not compelled to buy. In arriving at that value, you will take into account all the considerations that would fairly be brought forward and reasonably be given weight by well informed men engaged in such bargaining.

Market value does not mean what a person would be willing to pay for certain land which he was under the necessity of buying. Neither does it mean the price at which an owner would sell at a time when he found it necessary to sell. To get the market value you must find that value that would be reached, as I have stated before, by a seller willing but not required to sell, and a buyer willing but not required to buy. These two elements, taken together, go to make up the market value; one alone does not do so.

In arriving at the fair market value of these lands you are not to fix speculative, boom or fancy values; on the other hand, you are not to fix depression or forced sale values, because the law requires you to determine the fair reasonable market salable value of the property, if the owner [1256] was offering to sell on usual terms, but not compelled to do so, and the buyer was offering to buy on usual terms, but not compelled to do so.

In your deliberations elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value.

If you find that the condemnation and taking by plaintiff United States of America of Parcel A herein was a part of the same project for which the other lands herein have been condemned and taken by the United States of America, and that it was certain on November 10, 1942, that Parcel A would be condemned and taken as a part of the same project for which the other lands herein condemned have been taken, then and in that event you must evaluate Parcel A in the same manner and use the same date of valuation as if Parcel A had been included in the original complaint for condemnation filed herein November 10, 1942.

In arriving at just compensation to be paid by plaintiff herein for the taking of the interests in land, other than the interests of the Tavares Construction Company, Inc. and its associates, you must not include within your determination of just compensation any increment in

value based upon [1257] the expenditure of funds by the government of the United States in dredging such lands or any portion of them subsequent to November 10, 1942; and if you find that any witness in arriving at his opinion of value as to interests taken herein, other than the interests of Tavares Construction Company, Inc. and its associates, has included in his opinion of value any increment resulting from the expenditure of funds by the United States of America subsequent to November 10, 1942 in dredging such lands, or any portion of them, then you are to disregard such elements in considering the weight of such opinion of value.

In relation to Parcel 9, you are instructed that the owners of this property are Carl A. Johnson and Pearl Johnson, husband and wife, as owners in fee of said land. The fee title to their land is different from that of the City of National City, in that Carl A. Johnson and Pearl Johnson, as such owners, had the right of mortgage or conveyance of their title and interest in said land, without restriction. In your determination of the fair market value in arriving at the amount of compensation to be awarded them from the property taken from them by the United States Government by condemnation, you will fix the value of your award of compensation in one sum without including therein any separate value for the building that was located on their lands at the time of the taking. The amount of your award of compensation, [1258] therefore, is to be the amount you determine as just compensation for the reasonable market value of the property of Mr. and Mrs. Johnson on November 10, 1942, which was the date of the institution of these condemnation proceedings and the date of the declaration of taking.

The property taken from the Johnsons was tangible property as distinguished from intangible property which you are concerned with in respect to the claims of all other defendants, other than the City of National City.

In arriving at your verdict for the just compensation herein as you shall determine for the fee title of Parcel 9 taken from the Johnsons, you will take into consideration each of the elements of this definition of what is the reasonable market value of property, and fix the value of their land, taking into consideration the building thereon, and make an award in one sum.

As has been stated, the only issue for you to determine in this action with respect to those parcels owned by the defendant, City of National City, is the amount to be awarded as the fair market value of the property at the time of the taking. Upon this issue the burden rests upon the defendant, City of National City, and it is therefore required to prove by a preponderance of the evidence the value of the land taken and the amount which it is entitled to receive as just compensation. In this connection you are instructed, however, [1259] that in any event it is the duty of the jury to determine the fair market value of the property, and that value must be awarded to the defendant. In other words, in a case of this character under no circumstances could you refuse to make an award to the defendant. In like manner the burden rests upon the San Francisco Bridge Company to establish by a preponderance of the evidence the fair market value of its interest and rights in the property.

The owners of property which is taken in a condemnation proceeding are entitled to recover an award of money for the taking of their property. With regard to the

eight parcels of land owned by the defendant, National City, it is not claimed that there was any detriment suffered other than by reason of the taking of the described parcels; and therefore as to these parcels the owners are to be awarded that amount which will justly compensate them for the taking of such parcels. With respect to such area the owners are entitled to recover the actual value of the land, that is to say, the market value as of the time of the taking thereof by the United States Government, to wit, on November 10, 1942. The market value is the highest price in terms of money which the land will bring if exposed for sale in the open market with a reasonable time allowed to find a purchaser, buying with knowledge of all the uses and purposes to which the land is adaptable and for which it is capable of being used. This [1260] contemplates a sale to be made in a reasonable time to a purchaser who is willing to pay what the land is fairly worth and a sale to be made by a seller not acting under any compulsion, who is willing to accept what the land is actually worth. The sum that could thus be reasonably obtained is defined in law as the market value, and is the measure of just compensation in this action.

Defendant San Francisco Bridge Company requests the Court to give the following instruction, which will now be given:

San Francisco Bridge Company is interested in this action by reason of and to the extent of its lease from the City of National City, which had seventeen years and eleven months still to run on November 10, 1942. You are called upon to fix the fair market value of the leasehold as of such date, to wit, November 10, 1942.

In arriving at your verdict in this case you should first of all arrive at a determination of the value of the lands owned by the City of National City at the time of commencement of this action in one lump sum, and arrive at a separate determination of the value of Parcel 9 owned by Mr. and Mrs. Johnson; you should then allot from the total sum which you have found to be the value of the land taken from the City of National City, exclusive of the interests of Tavares Construction Company, Inc. and its associates, that portion of your award which you find to be just compensation for the [1261] taking of the interests of the San Francisco Bridge Company; and you should allot to the City of National City that portion of your total award for the lands formerly owned by the City of National City which you find to be just compensation for the taking of the interests of said City. You are further instructed, however, that the sum of your award to the San Francisco Bridge Company, plus your award to the City of National City, must not be greater than the total award which you have determined to be just compensation for the taking of all of said interests in said lands, exclusive of the interests of Mr. and Mrs. Johnson and exclusive of the interests of the Tavares Construction Company, Inc. and its associates, for the whole cannot be greater than the sum of its parts. You are instructed further that in arriving at the value of the interests taken herein, other than the interests of Tavares Construction Company, Inc. and its associates, you must not consider any increment in such lands arising subsequent to November 10, 1942 from the expenditure of funds by the government, whether it be by dredging or the building of improvements upon said lands.

With relation to the interest of the defendant, Tavares Construction Company and its associates, such interests are to be evaluated at a later date than the interests of other defendants taken herein. The interest of the Tavares Construction Company and its associates arises out of an instrument which [1262] is in evidence as defendants' Exhibit W, an agreement entered into between Tavares Construction Company and the Defense Plant Corporation; you are to determine what is the fair market value of the interest arising out of such instrument, to wit, what is the amount for which the interest of said Tavares Construction Company and its associates under said instrument of agreement could have been sold for on the open market for cash on December 23, 1944, the date it was taken or cancelled by this proceeding or within a reasonable time thereafter; and in this connection if you find that the interest of the Tavares Construction Company and its associates under said instrument of agreement is so speculative and conjectural that no purchaser in the open market would have purchased the same except for a nominal consideration then your verdict as to the interest of the Tavares Construction Company and the Concrete Ship Constructors herein must be in a nominal figure only. You are to take into consideration the terms and conditions of the whole of said agreement and are to consider what effect, if any, a willing seller and a willing buyer would give to all of the terms and conditions of said agreement with Defense Plant Corporation in arriving at a determination as to the price for which the interest of said Tavares Construction Company and its associates under said instrument of agreement would bring at such sale.

If you find in favor of the Tavares Construction Company [1263] Inc. and against the government, you are to make your award to Tavares Construction Company, Inc. the market value, as of December 23, 1944, of the leasehold estate which Tavares Construction Company, Inc. held on the entire shipyard site, facilities and machinery from the Defense Plant Corporation.

In arriving at the amount of such award, if any you make for Tavares Construction Company, Inc., you are to take into consideration the possessory rights granted by the lease, Defendants' Exhibit W, to use the shipyard site, facilities and machinery for the period ending December 31, 1949, but subject to the right of the government to prior use thereof if requested during such period, and also subject to the right of either party to sooner terminate the lease whenever substantial use thereof would no longer be needed by the Tavares Construction Company, Inc. to construct boats for sale to the government and all other terms and conditions of said lease, Defendants' Exhibit W.

In arriving at the amount of such award, if any, for Tavares Construction Company, Inc. that you are also instructed to take into consideration the option rights of Tavares Construction Company, Inc. to purchase the entire shipyard site, facilities and machinery during the 90-day period following the expiration of the lease on December 31, 1947, or following the expiration of the extension of the lease on December 31, 1949, or following the sooner termination of the lease by either party in the event the substantial use of the site, facilities and machinery should no longer be needed by Tavares Construction Company, Inc. for the construction of boats for sale to the government.

In arriving at the amount of such award, if any, for Tavares Construction Company, Inc. you are instructed that you are also to take into consideration any and all other advantages and disadvantages to the lessee contained in the provisions of said lease and all of the amendments thereto.

In arriving at the market value of the leasehold estate held by Tavares Construction Company, Inc. if any you find, on December 23, 1944, you are to view all of the factors shown and included in and by Defendants' Exhibit W in the light of the conditions as they were known on December 23, 1944, and which at that time would have been reasonably expected would occur in the future, and which a willing purchaser after a reasonable investigation would have then taken into consideration.

Evidence has been received in this case with relation to the interest of the defendant, Tavares Construction Company, Inc. That interest arises out of an instrument which is in evidence as Defendants' Exhibit W. That instrument is a lease coupled with an option. In your consideration of that feature of the case you will proceed in the same manner as you proceed as to the market value of the land, the question [1265] being what could it have been sold for on the open market for cash on December 23, 1944, the date it was taken or canceled by this proceeding, or shortly thereafter, above what Tavares Construction Company, Inc. would have to have paid under all its terms and conditions. If you find the company could have made such a sale your verdict will be for the amount you in your judgment determine the company could have gotten for it. You will consider the entire instrument, not just parts of it. If you find it could not

have been sold, then your verdict as to Tavares Construction Company, Inc. will be zero.

Ladies and gentlemen, there has been prepared, for your convenience only, a form of verdict, and I think it is self-explanatory. It states the four different subdivisions of the case, the Johnson interests, the National City interests, the San Francisco Bridge Company interests, and the Tavares Construction Company interest, and there are on the righthand margin of the form, which is prepared for your convenience only, blank spaces which, in the event that you find a verdict, will be filled in appropriately, in accordance with your unanimous agreement; that is to say, that each and every one of you must agree upon a verdict before it is recorded upon that form. But each of these interests are entitled to separate consideration, except as to the consolidated aspect of the interests of National City and of [1266] San Francisco Bridge Company, concerning which the court has already fully instructed you, and each interest is entitled to the individual consideration and finding of the jury. When you have done so, you will have the verdict signed by one of your number, whom you will appoint to act as foreman, and will then return into court with the signed verdict.

Are there any exceptions to the charge, gentlemen?

Mr. Landrum: If the court please, the government respectfully excepts to the court's failure to give plaintiff's request instruction 1 and plaintiff's requested instruction 1-A.

The Court: The exception will be noted. Any further exceptions?

Mr. Monroe: Your Honor please, the defendant, National City, excepts to the failure of the court to give its

requested instruction No. 12. That you will recall we have discussed.

Might I also add this, that we except to the charge relative to the verdict as to the San Francisco Bridge Company, in which, as I recollect, it apparently said, if I quote it right, that there was to be awarded to National City the portion of the value allocated to it, which I believe is not as written in the verdict. I think there is perhaps a thing there that might be explained to the jury.

The Court: I think the instructions sufficiently cover [1267] the matter. It might be that we could elaborate a little without in any manner affecting the instructions which have heretofore been given.

In other words, ladies and gentlemen, the award to the City of National City should be an award to that municipal corporation for the market value of the property taken, and when you have reached that figure, then you will consider the award which should be made to the San Francisco Bridge Company, and the total of the two must not exceed the value which you found to be the value of the interests of the City of National City. Does that clarify it?

Mr. Monroe: I think perhaps so. Might we also except to the portion of the charge that fixes the date of the valuation as to the Tavares parcels affecting National City? In that connection, your Honor, I simply refer to the arguments that I have heretofore presented to you, for the purpose of preserving those matters.

The Court: Yes, the record may so show.

You may swear the officers, Mr. Clerk. Or, perhaps before the officers are sworn there should be a stipulation, or perhaps we can have that when the jury retires. There are no facilities or conveniences here to keep a jury over-

night, and I am not disposed, if the jury are unable to reach an agreement before the end of a seasonable and appropriate hour for retiring to not let the jury go to their own homes [1268] and to come back tomorrow to proceed with their deliberations.

I assume you all stipulate that may be done?

Mr. Landrum: So stipulated.

Mr. John M. Martin: So stipulated.

Mr. Muir: So stipulated.

Mr. Sloane: So stipulated.

Mr. Monroe: So stipulated.

The Court: Swear the officers to take charge of the jury.

(The officers were duly sworn.)

The Court: Now, you will go with the officers, ladies and gentlemen.

You may have the exhibits, if you desire them.

Also, you may each take those two exhibits which you have had during the trial, if there is no objection.

Mr. Landrum: No objection, your Honor. I would like to know about the other exhibits also.

The Court: If they want them, they will ask for them, and we will send them all to them, if there is no objection by the other parties.

Mr. Landrum: That is agreeable.

Mr. John M. Martin: Agreeable.

Mr. Sloane: Agreeable.

Mr. Monroe: That is agreeable.

Mr. Muir: That is agreeable. [1269]

A Juror: Could we have the other exhibits?

The Court: Very well. We will send them all up to you, all of the exhibits that have been received in evidence.

(Thereupon the jury retired from the court room for its deliberations.)

The Court: Gentlemen, before you go there is one matter that I would like to discuss with you. Sometimes we are required to wait a little longer than we should if counsel should go back to their offices or have some other appointments, and if it is agreeable, I would like to have a stipulation from all of you that the verdict may be received in the absence of counsel, and that if the jury requests further instructions, and the court concludes that they should be given, that they may be given in the absence of counsel and in the presence of the reporter, who will take them down, and that you may have any exceptions that any of you may desire to any adverse rulings.

Mr. Landrum: The plaintiff will be happy to stipulate to that effect in both instances, your Honor.

Mr. John M. Martin: So stipulated, your Honor.

Mr. Monroe: So stipulated.

Mr. Muir: So stipulated.

Mr. Sloane: San Francisco Bridge so stipulates.

The Court: Perhaps you had better wait around for a while, however. [1270]

1300 *Tavares Construction Company, Inc., et al.*,

San Diego, California, Thursday, February 27, 1947.  
6:10 P. M.

(Jury present.)

The Court: Mr. Foreman, Mr. Roberts, the court has received the following note, which was transmitted, I understand, by you to the bailiff: "We would like to hear the instructions re Tavares leasehold. A. E. Roberts, Foreman." You wrote that, did you?

The Foreman: Yes, sir.

The Court: File it, Mr. Clerk. If I understand the request, Mr. Roberts, of course, the charge as a whole, ladies and gentlemen, pertained not only to the Tavares interests but to all of the interests. So that the term "just compensation" and "market value" and all of those other features, credibility of witnesses and so forth, applies to Tavares as well as all of the others. But I apprehend what was meant was the three or four specific instructions that relate to that interest.

The Foreman: That is right, sir.

The Court: I will reread those. The record may show that one of the attorneys, Mr. Frank Martin, is in the court room.

"With relation to the interest of defendant Tavares Construction Company and its associates such interests are to be evaluated at a later date, than the interests of other [1271] defendants taken herein. The interest of the Tavares Construction Company and its said associates arises out of an instrument which is in evidence as Defendants' Exhibit W, an agreement entered into between Tavares Construction Company and the Defense Plant Corporation; you are to determine what is the fair market value of the interest arising out of such instru-

ment, to-wit: What is the amount for which the interest of said Tavares Construction Company and its associates under said instrument of agreement could have been sold for on the open market for cash on December 23, 1944, the date it was taken or canceled by this proceeding or within a reasonable time thereafter; and in this connection if you find that the interest of the Tavares Construction Company and its associates under said instrument of agreement is so speculative and conjectural that no purchaser in the open market would have purchased the same except for a nominal consideration, then your verdict as to the interest of the Tavares Construction Company and the Concrete Ship Constructors herein must be in a nominal figure only. You are to take into consideration the terms and conditions of the whole of said agreement and are to consider what effect, if any, a willing seller and a willing buyer would give to all of the terms and conditions of said agreement with Defense Plant Corporation in arriving at a determination as to the price for which the interest of said Tavares [1272] Construction Company and its associates under said instrument of agreement would bring at such sale.

"If you find in favor of the Tavares Construction Company, Inc., and against the government, you are to make your award to Tavares Construction Company, Inc., the market value, as of December 23, 1944, of the leasehold estate which Tavares Construction Company, Inc., held on the entire shipyard site, facilities, and machinery from the Defense Plant Corporation.

"In arriving at the amount of such award, if any you make for Tavares Construction Company, Inc., you are to take into consideration the possessory rights granted by the lease, Defendants' Exhibit W, to use the shipyard site, facilities and machinery for the period ending December 31, 1949, but subject to the right of the government to prior use thereof if requested during such period, and also subject to the right of either party to sooner terminate the lease whenever substantial use thereof would no longer be needed by the Tavares Construction Company, Inc., to construct boats for sale to the government, and all other terms and conditions of said lease, Defendants' Exhibit W.

"In arriving at the amount of such award, if any, for Tavares Construction Company, Inc., that you are also instructed to take into consideration the option rights of Tavares Construction Company, Inc., to purchase the entire shipyard [1273] site, facilities and machinery during the ninety-day period, following the expiration of the lease on December 31, 1947, or following the expiration of the extension of the lease on December 31, 1949, or following the sooner termination of the lease by either party in the event the substantial use of the site, facilities and machinery should no longer be needed by Tavares Construction Company, Inc., for the construction of boats for sale to the Government.

"In arriving at the amount of such award, if any, for Tavares Construction Company, Inc., you are instructed that you are also to take into consideration any and all other advantages and disadvantages to the lessee contained

in the provisions of said lease and all of the amendments thereto.

"In arriving at the market value of the leasehold estate held by Tavares Construction Company, Inc., if any you find, on December 23, 1944, you are to view all of the factors shown and included in and by Defendants' Exhibit W in the light of the conditions as they were known on December 23, 1944, and which at that time would have been reasonably expected would occur in the future, and which a willing purchaser after a reasonable investigation would have then taken into consideration. Evidence has been received in this case with relation to the interest of the defendant Tavares Construction Company, Inc. That interest arises out of an instrument which is in evidence as Defendants' Exhibit W. [1274] That instrument is a 'lease coupled with an option.' In your consideration of that feature of the case you will proceed in the same manner as you proceed as to the market value of the land, the question being what could it have been sold for on the open market for cash on December 23, 1944, the date it was taken or canceled by this proceeding, or shortly thereafter, above what Tavares Construction Company, Inc., would have to have paid under all its terms and conditions. If you find the company could have made such a sale your verdict will be for the amount you in your judgment determine the company could have gotten for it. You will consider the entire instrument, not just parts of it. If you find it could not have been sold, then your verdict as to Tavares Construction Company, Inc. will be zero."

Those are all of the instructions, I believe, on that point. You may retire, ladies and gentlemen.

(The jury thereupon retired and a recess was taken at the hour of 6:20 o'clock p. m.) [1275]

San Diego, California, Thursday, February 27, 1947,  
6:40 P. M.

(Frank Martin, Esq., present.)

The Court: The record may show all of the jurors present and Mr. Frank Martin, representing the defendant Tavares Construction Company, in court. Ladies and gentlemen of the jury, have you agreed upon a verdict?

The Jury: We have, your Honor.

The Court: You may hand it to the bailiff, please, Mr. Foreman.

The Clerk:

"In the District Court of the United States

"In and for the Southern District of California

"Southern Division

"United States of America, Plaintiff, vs. Certain Parcels of Land in the City of National City, County of San Diego, State of California; Tavares Construction Company, et al., Defendants. No. 248-SD Civil.

### VERDICT

"We, the Jury in the above-entitled cause, sworn and impaneled to determine just compensation for the condemnation and taking of certain property herein involved, find the just compensation to be as follows [1276]

"Parcel 9 (known as the Johnson land) \$6,750.00

"Parcels 1, 2, 3, 5, 6, 7, 8 and A (known as the City of National City Land) \$650,000.00

"Out of which last-named sum we allocate to the San Francisco Bridge Company as just compensation for the condemnation and taking of its leasehold interest, \$50,000.00

“To Tavares Construction Company, Inc.,  
a corporation, Concrete Ship Constructors,  
a joint venture, Lloyd S. Stroud,  
R. S. Seabrook, C. M. Elliott, Carlos  
Tavares, Henry M. Page, Don F. Gates  
and Stroud-Seabrook, a co-partnership,  
for the condemnation and taking of all  
their interests under the agreement of  
December 27, 1941, (known as Plancor  
407, as amended) \$ 0

“Dated: San Diego, California, February 27, 1947.

A. E. Roberts,

Foreman.”

The Clerk: Ladies and gentlemen, is this your verdict? So say you one, so say you all?

The Jury: It is.

The Court: To complete the verdict, Mr. Clerk, file it and, pursuant thereto, at an appropriate time to be indicated by the court, judgment will be entered in the records of the court.

(Jury thanked by the court for its service and discharged from further consideration of this case.)

(Adjournment taken at 6:50 o'clock p. m.)

[DEFENDANTS' EXHIBIT Q]

FACILITIES AND MACHINERY

OPTION PRICE AS OF DECEMBER 23, 1944

## (Defendants' Exhibit Q)

Option Price as of December 23, 1944 of the Facilities and Mac  
as Calculated by Gregory D. Smith from Assets-Property H  
of Defense Plant Corporation Under Lease Agreement be  
Defense Plant Corporation and Tavares Construction Co.  
dated December 27, 1941, and Amendments thereto.

- 
1. Buildings, Ways, Docks, Structures, Improvements (fe  
paving, spur tracks, etc.,) and Building Installations other  
Mechanical
- 

Asset Property  
Record  
Schedule Page

Item

Description

1A	1100	Land, 99.89 acres being acquired through condemnation by Government.	Acquisition costs of lease and assignment; fee, attorney's fees and Lien report.
1B	1201	Preparation of Site	Clearing site, removing AT&SF Ry. Wye, SF Bridge Co. Dock Dredging
IIA	2101	Administration Building	Two-story frame, first floor 11.607 sq.ft., second 10.530 sq.ft., concrete foundation, ceiling 10 ft., comp. roof, exterior sheathing 1"x6" siding, celotex interior walls and ceilings, flooring, wood sash, floor design for 500 sq.ft. Building contains two-story concrete 15'x15'
IIA	2102	Electric Shop and Compressor Building	One-story frame building with concrete floors, sq.ft. ceiling height 10'4"; exterior sheathing and batten, comp. roof, wood sash
IIA	2103	Field Office and First Aid Building	One-story frame building, 30x117, 3/510 sq.ft. mud sill foundation; ceiling height 8 ft., composition roof, exterior sheathing, board and batten, celotex interior, walls and ceilings 4" pine floors signed for 40# per sq.ft. wood sash.
IIA	2104	Machine Shop	One-story frame machine shop and office 4,960 sq.ft. Machine Shop 40x100 w/82/0 office and 246 sq.ft. shed. Concrete floor height in office 9'. Ceiling height in office. Exterior sheathing board and batten. Exterior walls in office. Concrete working side of building 69x90—5,400 sq.ft.

Buildings, Ways, etc.  
Page 1 of 8

	Depreciation Years to 12/23/44	Original Cost	Depreciation at 5% per each year or fractional part thereof	Option Price as of 12/23/44
1	3	529.15	79.37	449.78
	3	8,743.72	1,311.56	7,432.16
	2	109,691.20	10,969.12	98,722.08
	3	54,737.21	8,210.58	46,526.63
	3	7,674.02	1,151.10	6,522.92
	3	10,153.50	1,523.02	8,630.48
	3	15,049.43	2,257.41	12,792.02

1308 Tavares Construction Company, Inc., et al.,  
 (Defendants' Exhibit Q)

Asset Property Record Schedule Page		Item	Description
IIA	2105	Mill Building #1	One-story frame mill building with concrete floor area—2516 sq.ft. (40x57—13'6"x17'6") height 11'6". Exterior sheathing, board and composition roof. Wood sash.
IIA	2106	Mill Building #2	One-story frame mill building with concrete Floor Area—1300 sq.ft. Ceiling height 11'6". Exterior sheathing, board and batten Composition roof, wood sash.
IIA	2107	Mill Building #3	One-story frame mill building with concrete Floor Area 3920 sq.ft. Ceiling height 12'6". Exterior sheathing, board and batten Composition roof. Wood sash.
IIA	2108	Outfitting Shop	One-story frame building 40x56 sq.ft. Concrete Ceiling Height 13½' Composition Roof, sheathing board and batten, wood sash.
IIA	2109	Paint Shop	One-story frame building with concrete floor 1440 sq.ft. Exterior sheathing, board and wood sash, composition roof, 10'4" ceiling.
IIA	2110	Steel Office	One-story building (frame) 20x55—1100 sq.ft. and batten outside Celotex walls and ceiling, 1" pine floors, wooden sash, foundation mud sills. Ceiling height 8' Composition roof.
IIA	2111	Timekeeping and Personnel Building	One-story frame office building, 5200 sq.ft. (30x176') with two wings 24x26), concrete block foundation, 8' ceiling, composition roof, celtex interior and ceilings, exterior wood sheathing, 1" pine siding, 4" pine floors, wood sash, floor slab 50 lb. per sq.ft., concrete vault 16'x24'.
IIA	2112	Wet Dock No. 1 Length—425' Depth—to top of caps 25' Depth to bottom of excavation—30'	North, east and south sides of dock formed by untreated 8"x12" wood sheet piling. West side of dock consists of removable reinforced caisson gate. Elevation of ground surface dock minus 18; elevation top of gate sea level 13. The bottom support for ship construction consists of 12x12 DF Caps, 76' long, resting on Douglas Fir untreated piles 25' to 30' in length to twenty ton bearing. The rows of piles are spaced 5'5½" center to center. Elevation of caps vary from minus 12 to minus 13. Water maintained inside of wet dock by well points consisting of 8" headers & 1½" well points. Continuous pumping required. Ship launching by means of dock.

Buildings, Ways, etc.  
Page 2 of 8

Depreciation Years to 12/23/44	Original Cost	Depreciation at 5% per each year or fractional part thereof	Option Price as of 12/23/44
3	4,253.46	638.02	3,615.44
3	1,925.61	288.84	1,636.77
3	8,360.42	1,254.06	7,106.36
2	3,360.00	336.00	3,024.00
2	2,462.41	246.24	2,216.17
3	2,336.78	350.52	1,986.26
3	12,905.53	1,935.83	10,969.70
3	174,283.89	26,142.58	148,141.31

## (Defendants' Exhibit Q)

Asset Property  
Record  
Schedule Page

		Item	Description
IIA	2113	Wet Dock No. 2 Length—425'; Width 76' Depth to top of caps 25' Depth to bottom of excavation—30'	North, east and south sides of dock formed untreated 8"x12" wooden sheet piling. West end of dock formed by removable reinforced caisson gate. Elevation of ground surface of wooden sheet piling minus 12; elevation surface inside of dock minus 18; elevation gate seat minus 13. The bottom support construction consists of 12x12 DF Caps, resting on Douglas Fir Untreated Piles 25' length driven to twenty ton bearing. The piles are spaced 5'5½" center to center. Elevation of top of caps vary from minus 12 to minus 13. Water level maintained inside of wet dock by well points, consisting of 8" headers and 1½" well points. Continuous pumping required. Ships launched by flooding dock.
IIA	2114	Wet Dock No. 3 Length 425' Width 76' Depth at top of caps 25.75' Depth to bottom of excavation—30'	North, east and south sides of dock formed steel sheet piling. West end of dock contains removable reinforced concrete caisson gates. Elevation of ground surface at top of steel sheet piling plus 12; elevation of ground surface inside of dock minus 18.75'. Elevation top of gate seat minus 13.75'. The bottom support for ship construction consists of pile caps, 76' in length built up from 5-3x12 planks bolted together, resting on DF untreated piles 25' to 30' in length, driven to 20 ton bearing. Elevation at top of pile cap from minus 13.75 to minus 12.75. The piles are spaced 5'5½" center to center. Water level maintained inside of wet dock by well points, consisting of 8" headers and 1½" well points. Continuous pumping required. Ships launched by flooding dock.
IIA	2115	Wet Dock No. 4 Length 425' Width 76' Depth at top of caps 25.75'. Depth to bottom of excavation 30'	North, east and south sides of dock formed steel sheet piling. West end of dock contains removable reinforced caisson gates. Elevation of ground surface at top of steel sheet piling plus 12; elevation of ground surface inside of dock minus 18.75'. Elevation top of gate seat minus 13.75'. The bottom support for ship construction consists of pile caps 76' in length built up from 5-3x12 planks bolted together, resting on DF untreated piles 25' to 30' in length, driven to 20 ton bearing. Elevation at top of pile cap varies from minus 13.75 to minus 12.75. The rows of piles are spaced 5'5½" center to center. Water level maintained inside of wet dock by well points, consisting of 8" headers and 1½" well points. Continuous pumping required. Ships launched by flooding dock.

Buildings, Ways, etc.  
Page 3 of 8

Depreciation Years to 12/23/44	Original Cost	Depreciation at 5% per each year or fractional part thereof	Option Price as of 12/23/44
3	174,283.90	26,142.58	148,141.32
2	256,476.01	38,471.40	218,004.61
2	256,476.03	25,647.60	230,828.43

## 1312 Tavares Construction Company, Inc., et al.,

(Defendants' Exhibit Q)

asset Property  
Record  
schedule Page

		Item	Description
IIA	2116	Outfitting Pier 50' wide x 430' long, extending west from U. S. Bulkhead line.	Pier consists of 12" reinforced concrete de- ported by 43 bents at 10' centers. Th- 430-40 to 42' support piles under bents. are 40-54' treated batter piles. The outside fenders are supported by 88-40' creosoted
IIA	2117	Warehouse No. 1	One-story frame warehouse (54x75'6"0-429 Outside platform W/2" decking (40x54) 21 Concrete floor area-2160 sq.ft. Dirt floor 1360 sq.ft. Wood floor area-780 sq.ft. height-11' and 13'6". Composition roof, sheathing, board and batten.
IIA	2118	Navy Warehouse	One-story frame building with shed roof, 40x addition 20x30-3000 sq.ft. concrete floor, height 13', composition roof, exterior sh- board and batten, wood sash.
IIA	2119	Warehouse No. 3	One-story frame warehouse. Main building 20,160 sq.ft. Office 28x46-1288 sq.ft. P 43x45 and 30x10' 2,295 sq.ft.
		Main Warehouse	Concrete floor, 20,160 sq.ft. 9,940 sq.ft. of t warehouse has a mezzanine floor to incre storage area.
		Warehouse Office	28x48' 1344 sq.ft. This constructed on top of elevated warehouse platform. Ceiling heig Composition roof, exterior sheathing, bo batten celotex walls and ceiling, 4" pin wood sash. This addition contains two (4 rooms.
IIA	2120	Warehouse No. 4	Elevated platforms (wood) w/2" plankin wooden mud sills-43x45' and 36x10', 2,295
IIA	2121	Mold Loft No. 1	One-story frame warehouse 30x50', 1500 sq. ing height 11'6" Foundation 5-4x10 mu Composition roof, exterior sheathing, bo batten 2x12 pine floors, wood sash.
		Mold Loft No. 2	4" Concrete foundation with 2x5 sleepers tongue and groove pine floor 64x220-14,300 4" Concrete foundation with 2x4 sleepers tongue and groove pine floor 50x85x2, 8,500

Buildings, Ways, etc.  
Page 4 of 8

	Depreciation Years to 12/23/44	Original Cost	Depreciation at 5% per each year or fractional part thereof	Option Price as of 12/23/44
2	3	114,317.04	17,147.56	97,169.48
2	3	5,560.00	834.00	4,726.00
2	3	3,607.93	541.19	3,066.74
2	3	22,022.93	3,303.44	18,719.49
3	2	2,250.00	225.00	2,025.00

## (Defendants' Exhibit Q)

Asset Property  
Record  
Schedule Page

Item

Description

		Mold Loft No. 2-A	4" concrete foundation with 2x4 sleepers tongue and groove pine floor 65x95x2, 12,3																																			
		Mold Loft No. 3	4" concrete foundation with 2x4 sleepers tongue and groove pine floor 65x220, 14,3 Total square feet 49,480.																																			
IIA	2122	Yard Toilets and Wash Rooms	For details of construction see following table <table> <thead> <tr> <th>Bldg. No.</th> <th>#17</th> <th>#23</th> <th>#41</th> <th>#47</th> </tr> </thead> <tbody> <tr> <td>Sq. Ft.</td> <td>220</td> <td>264</td> <td>396</td> <td>396</td> </tr> <tr> <td>Floor</td> <td>Wood</td> <td>Concrete</td> <td>Concrete</td> <td>Concrete</td> </tr> <tr> <td>Ceiling</td> <td></td> <td></td> <td></td> <td></td> </tr> <tr> <td>Height</td> <td>8'6"</td> <td>8'6"</td> <td>8'6"</td> <td>8'6"</td> </tr> <tr> <td>Sheathing</td> <td>B&amp;B</td> <td>B&amp;B</td> <td>B&amp;B</td> <td>B&amp;B</td> </tr> <tr> <td>Sash</td> <td>Wood</td> <td>Wood</td> <td>Wood</td> <td>Wood</td> </tr> </tbody> </table>	Bldg. No.	#17	#23	#41	#47	Sq. Ft.	220	264	396	396	Floor	Wood	Concrete	Concrete	Concrete	Ceiling					Height	8'6"	8'6"	8'6"	8'6"	Sheathing	B&B	B&B	B&B	B&B	Sash	Wood	Wood	Wood	Wood
Bldg. No.	#17	#23	#41	#47																																		
Sq. Ft.	220	264	396	396																																		
Floor	Wood	Concrete	Concrete	Concrete																																		
Ceiling																																						
Height	8'6"	8'6"	8'6"	8'6"																																		
Sheathing	B&B	B&B	B&B	B&B																																		
Sash	Wood	Wood	Wood	Wood																																		
IIA	2123	Miscellaneous Small Buildings	Temporary Frame Buildings on Temporary foundations 8,299 sq.ft.																																			
IIA	2124	Miscellaneous Work Performed on Buildings on that portion of the Original site which was abandoned for use by the Navy.	Machine Shop—Mill Buildings—Wash Rooms houses—Timekeeping Building—Engineering Mold Lofts—Administration Building.																																			
IIB	2201	Heating and Plumbing Fixtures in Buildings																																				
IIB	2202	Lighting Fixtures																																				
IIB	2203	Miscellaneous Building Installations (Non-mechanical)	4 Exhaust Fans—Fire Gong.																																			
IIC	2301	Special Gantry Track for Handling Skeggs	Approximately 300 lineal feet of 30 lb. rail on ard timber railroad ties. Spaced 16" on c																																			
IIC	2302	West Bulkhead A 380' Section of Bulkhead north of Dock No. 1, consisting of 30' 14" steel H. Piles (#89 per foot), on 10' centers with precast concrete slabs between piling extending to a depth of 19' below the top of the piles.	Top of piles driven to elevation plus 12. 1 rap placed in front of piles on slope of 1 from elevation minus 2 to elevation minus between Docks 1 & 2 and 60' North of Dock bulkhead consists of steel sheet piling at elevation of top of piling plus 12. From 6 of Dock 3 to 40' south of Dock 2 there bulkhead protection.																																			
IIC	2303	Roads & Gravel Surfacing	Inside the yard there are approximately 7,000 feet of graded, unpaved roads.																																			

Buildings, Ways, etc.  
Page 5 of 8

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te al e	Depreciation Years to 12/23/44	Original Cost	Depreciation at 5% per each year or fractional part thereof	Option Price as of 12/23/44
2	3	17,748.26	2,662.24	15,086.02
2	3	3,977.82	596.67	3,381.15
2-3	2½	14,537.38	1,817.17	12,720.21
2	3	17,298.81	2,594.82	14,703.99
2	3	6,874.61	1,031.19	5,843.42
2	3	6,906.86	1,036.03	5,870.83
2	3	103.08	15.46	87.62
3	2	3,865.17	386.52	3,478.65
2	3	62,094.15	9,314.12	52,780.03
2	3	9,474.08	1,421.11	8,052.97

## (Defendants' Exhibit Q)

Asset Property  
Record  
schedule Page

		Item	Description
IIC	2304	Yard Grading and Paving—Steel Yard	Yard Grading includes leveling and prepare site. Oil Paving done in steel yard.
IIC	2305	South Bulkhead Location: 450' Westerly from Dock No. 4	This bulkhead is constructed along U. S. I Line, consisting of 40' ZP32 Steel sheet driven to elevation minus 28. The bulkhead with 2- $\frac{3}{8}$ " tie rods, 50' long on 7' centers inforged concrete beams 24"x36" cast be piling at 15" centers.
IIC	2306	Railway Spur Tracks (On Leasehold)	There are 5 Spur Tracks—Rails 110# R #8 Switches.
IIC	2307	Boundary Fence	4,145' of #9 Gauge 2" mesh fencing. 3 Str Barb wire around top of fence. All mate vanized, 1,480 ft. of fence on northline wooden posts, balance steel posts. 3 sets o gates included in the above length.
IIC	2308	Sewage Pump Lift Includes Pumps, Mo tors, Switches	Reinforced concrete Sump 6' in diameter, 24"
IIC	2309	Sewer Mains	350' of 4" Concrete Sewer Pipe 3686' of 6" " "
IIC	2310	Telephone Lines (On Leasehold)	All yard telephone lines are placed in und conduits, 6,720' of $\frac{3}{4}$ " to 2". The telepho and equipment are the property of the California Telephone Company.
IIC	2311	Gantry Track #1 This Gantry is located midway between Docks 1 and 2. Length 790'.	The Gantry for this track is supported on rails, 14' apart. On the westerly 415' of t the rails are supported on 14x14 DF string ing on top of 14x14 DF Caps, 5' long, supported by 2 untreated DF piles 30' lo distance between bents 15'. On the remai the track the rail is supported on ties wi timbers at 30' centers.

Buildings, Ways, etc.  
Page 6 of 8

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	Depreciation Years to 12/23/44	Original Cost	Depreciation at 5% per each year or fractional part thereof	Option Price as of 12/23/44
	3	25,267.38	3,790.11	21,477.27
	2	56,939.23	5,693.92	51,245.31
-3	2½	20,822.52	2,602.82	18,219.70
	2½	6,837.42	854.68	5,982.74
	3	1,991.32	298.70	1,692.62
	3	11,672.62	1,750.89	9,921.73
	3	3,322.01	498.30	2,823.71
	3	19,450.81	2,917.62	16,533.19

Asset Property  
Record  
Schedule Page

## Item

## Description

IIC	2312	Gantry Track #2 Length 740'. Gantry No. 2 is located 67' south of the center line of Dock No. 2.	The tracks on this Gantry are carried on 110# rails. The distance between center trucks is 20'7". Each set of rails is supported on 8"x12"x8" ties on 20" centers with cross ties 30'. The track is supported by ballast to a depth of 1'9" below the top of the rail. Total length of track 780'.
IIC	2313	Gantry Track #3 Length 870'. The center line of Gantry No. 3 is 28' south of Dock No. 3	The track gauge for this Gantry is 32'. Each rail is supported on a reinforced concrete 32" wide by 24" deep. The stringer is supported on 35' DF untreated piles driven on a batter of 1 to 6 at 3'4" centers throughout the entire length of the track.
IIC	2314	Gantry Track #4 Total length of this Gantry as originally constructed is 875'. The center line of Gantry No. 4 is located 28' south of Dock No. 4.	The westerly 410' is supported on reinforced stringers 32" wide by 24" deep. The turn is supported on 35' DF untreated piles alternately on a batter of 1 to 6 at 3'4". The track is cross tied at 30' centers. The 465' of track is supported on 8"x12"x8" tie centers. The road bed is ballasted with gravel below the top of the ties.
IIC	2315	Water & Air Lines (On Leasehold)	This track has been extended easterly 228'. In extension the 110# rails are supported on 8" ties on 20' centers with 18" of gravel ballast top of ties. The track is cross tied at 30' centers.
		Steel Water Lines	Compressed Air Lines
		1270' 10" Steel Pipe	2050' 4" Steel Pipe
		750' 8" "	1010' 3" "
		6550' 6" "	6380' 2" "
		2030' 4" "	2250' 1" "
		490' 3" "	" "
		250' 2½" "	" "
		1420' 2" "	" "
		410' 1" "	" "
		400' 3/4" "	" "

Buildings, Ways, etc.  
Page 7 of 8

e al	Depreciation Years to 12/23/44	Original Cost	Depreciation at 5% per each year or fractional part thereof	Option Price as of 12/23/44
3	2	11,100.00	1,110.00	9,990.00
2	3	47,850.00	7,177.50	40,672.50
3	2	29,378.07	2,937.81	26,440.26
3	3	33,750.52	5,062.58	28,687.94

(Defendants' Exhibit Q)

Asset Property  
Record

Schedule	Page	Item	Description
IIC	2316	Floodlighting System	System for plant protection and night work consisting of 153 lights mounted on wood at various locations in the yard.
IIC	2317	Electrical Power & Light Lines	This includes power and light lines, all of which are laid in underground conduit. Power is supplied from the San Diego Consolidated Gas & Electric Company, delivered to the main substation site at 2300 V., 60 cycle, A.C. Distribution is 440, 220 and 110 volts.
IIC	2318	Substations 9 Power Substations 2 Lighting Substations	Concrete floor, steel frame supports for exterior wood or steel fence.
11C-1	2401	Exterior Fence (Outside of Leasehold)	300' of 72" #9 gauge 2" mesh fencing 1—self closing gates at railroad entrance on east side of property.
11C-1	2402	Railway Spur Tracks (Off Leasehold)	Rails 110# relay—2 #8 switches.
11C-1	2403	Telephone Lines (Off Leasehold)	The telephone cable in this conduit is the property of the Southern California Telephone Company.
11C-1	2404	Sewer Mains (Off Leasehold)	50' of 6" Concrete Steel Sewer Main. 200' of 6" Steel Concrete Sewer Main.
11C-1	2405	Waterline (Off Leasehold)	820'—6" Steel Pipe 1050'—10" " "
11C-1	2406	Abandoned Work	The following items of Construction were performed on that portion of the original site which was abandoned for use by the Navy. Preparation of Site Roadways and Area Paving Utilities

## SUB-TOTALS

2501-2 Pro-rata of Service Costs (For basis see notes on Summary Sheet)

## TOTALS

Buildings, Ways, etc.  
Page 8 of 8

	Depreciation Years to 12/23/44	Original Cost	Depreciation at 5% per each year or fractional part thereof	Option Price as of 12/23/44
2	3	3,181.40	477.21	2,704.19
2	3	79,075.31	11,861.30	67,214.01
2	3	34,107.73	5,116.16	28,991.57
2	3	500.00	75.00	425.00
2	3	2,906.54	435.98	2,470.56
2	3	156.00	23.40	132.60
2	3	1,196.00	179.40	1,016.60
2	3	4,360.00	654.00	3,706.00
2	3	37,501.98	5,625.30	31,876.68
		\$1,825,707.25	\$249,025.03 (13.64%)	\$1,576,682.22
		174,089.50	23,745.80	150,343.70
		\$1,999,796.75	\$272,770.83	\$1,727,025.92

## (Defendants' Exhibit Q)

Option Price as of December 23, 1944 of the Facilities and Mac  
as Calculated by Gregory D. Smith from Assets-Property I  
of Defense Plant Corporation Under Lease Agreement be  
Defense Plant Corporation and Tavares Construction Co.  
dated December 27, 1941, and Amendments thereto.

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2. Installations (mechanical), Movable Equipment, Cranes,  
Machinery, Shop Fixtures, Laboratory and Test Equi-  
Furniture and Fixtures, Loading and Lifting Trucks, etc.

Asset Property Record Schedule Page	Item	Description
III-A 3101/5	Miscellaneous	Clock, Couches, Fire Extinguishers
3106 2	Koehring Paving Type Concrete Mixers	Model 27-E, Serials 18470 & 18477 (used)
III-A-1 3201/14	Miscellaneous Machine Tools	Lathes, Benders, Drills, Thread, Mach. etc.
III-A-2 3201/2	Miscellaneous Equip- ment	Punch & Shears
3303 " "	" "	Steam Hammer
III-A-3 3401	1 Batching Plant	Used for batching of aggregates for concrete ship construction, 55 CU YD Capacity
3402 1	American Revolver Gantry Crane	Model #675 Serial No. 127, Electrically main hoist 3 drum, with 150 H.P., 3 pha Motor, 105' boom. Swinger—Single drum H.P. D.C. Motor (DPC #A-1)
	1 American Revolver Gantry Crane	Model #10125 Serial No. 202, Electrically 125' boom with following equip: 1—200 H.P., 440 V. 60 cycle motor 1—125 H.P., 440 V. 60 Cycle motor 1— 50 H.P., 440 V. 60 cycle motor 2— 15 H.P., 440 V. 60 cycle motor 3—2300/440 V Transformers (DPC #A-1)
3403 2	Washington Gantry Cranes	Serial #7837 and #7844, 43 ton capacity, 11 10' jib including following equipment: 2—150 H.P. 440V, 3 phase, 60 cycle motor 3— 30 H.P. 440V, 3 phase, 60 cycle motor 8— 15 H.P. 440V, 3 phase, 60 cycle motor 2—Ingersoll-Rand 1½ H.P. Compressors 2—Transformers Miscellaneous switch gear & controls
3404 1	Lorain Crane	Model 40-A Serial #10326 W/35' Boom, inte section, Clam equipment and boom splice, starter
	1 Williams-Clamshell Bucket	Model 1717 W/Standard weights and teeth #7230

Installations (mechanical), etc.  
Page 1 of 3 Pages

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te rial e	Depreciation Years to 12-23-44	Original Cost	Depreciation at 10% per each year or fractional part thereof	Option Price as of 12/23/44
2	3	290.88	87.26	203.62
2	3	14,790.36	4,437.11	10,353.25
2	3	14,440.79	4,332.24	10,108.55
3	2	6,908.19	1,381.64	5,526.55
2	3	1,812.62	543.79	1,268.83
3	2	638.00	127.60	510.40
2	3	61,502.31	18,450.69	43,051.62
2	3	33,873.91	10,162.17	23,711.74
3	2	60,351.10	12,070.22	48,280.88
2	3	141,321.02	42,396.31	98,924.71
2	3	7,528.47	2,258.54	5,269.93

## (Defendants' Exhibit Q)

3408 1 Model 501 Koehring Combination Shovel and Dragline

Serial #1029 equipped with a 6 cylinder D consin Gasoline Engine (Serial #1510 shovel boom with 16' dipper sticks, 1 $\frac{1}{4}$  C. per (attachment #697). 44' McCaffery Crane Boom with 1-5' Used

Asset Property  
Record  
Schedule Page

Item

Description

II-A-3	3427	1 Flash Welder	F-4 150 KVA, 440 Volt, 60 Cycle, Automatic Operated, air verticle clamps, automatic foot switch control, complete with one copper dies
	3443	1 Lumber Carrier	Model 90-12068 Ross Carrier #1796 equipped Wheel hydraulic brakes. Goodyear 12-2 Hercules WXLC-3 Motor #182242 and all Standard Equipment
	3444	1 Lumber Carrier	Model 90-7968-N Rose Carrier Serial #1867 4/4 wheet hydraulic brakes. Firestone 1 tires Hercula WXCL-3 Motor #188053 other Standard Equipment
	3405/7	Construction Equipment	Concrete towers, chutes, carts, electric hand swing saws, woodworking machines, fire extinguishers, hose carts, hose reels, etc.
	3409/26	" "	
	3428/41	" "	
	3445/56	" "	
III-B	3501	1 Gardner Denver Air Compressor	7 $\frac{1}{2}$ x5 $\frac{3}{4}$ x5 Class WE—Two stage with motor drive
	1	Ingersoll-Rand Air Compressor	888 Cu. Ft. capacity, Two stage with motor
	3502/8	Miscellaneous	Air Hoists, Chain Hoists, Chain Pullers, etc.
	3509	2 Reconditioned 8" Well Point Pump Electric Drive Vacuum	1750'-8" Header Pipe 1 $\frac{1}{2}$ " outlets 3' or 4' on 400-1 $\frac{1}{2}$ " self jetting well points 400—Swing Joint Assemblies 380-1 $\frac{1}{2}$ "x20' Blk Pipe thread both ends coupling 12-8" Ells for Header Pipe 6—Screw Gates Valves 8" 5-8" Ties 200-8" Spiral Weld Pipe W/couplings
	3510	1 Wintroath Vertical Turbine Pump #3026	Consisting of a High Vacuum, selfpriming. 1700 G-PM, complete with vacuum chamber Vacuum pump #30 HP direct drive, motor
	3511	1 Byron Jackson 6" Electric Centrifugal Pump	DPC 915 Serial #92685 Motor DPC 916, GI #520474, type 16-16A-1200, W/GE Electric trols and float switch W/7' of 6" Suctio and foot valve

2	3	5,180.00	1,554.00	3,626.00
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Installations (mechanical), etc.  
Page 2 of 3 Pages

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te	Depreciation Years to 12-23-44	Original Cost	Depreciation at 10% per each year or fractional part thereof	Option Price as of 12/23/44
2	3	7,415.27	2,224.58	5,190.69
2	3	7,485.00	2,245.50	5,239.50
3	2	6,592.10	1,318.42	5,273.68
2	3	41,201.42	12,360.43	28,840.99
3	2	11,348.56	2,269.71	9,078.85
4	1	3,879.56	387.96	3,491.60
2	3	6,852.49	2,055.75	4,796.74
2	3	14,117.05	4,235.11	9,881.94
3	2	1,006.69	201.34	805.35
2	3	14,269.40	4,280.82	9,968.58
2	3	1,965.23	589.57	1,375.66
2	3	187.50	56.25	131.25

## (Defendants' Exhibit Q)

3512	1 Used 3" Split Case Byron Jackson Pump	Direct connected to A-15 HP-440 V.-60 RPM 3 PH. Ball Bearing, U. S. Motor
3513	1 Wintroath Pump — Serial #3-73	1 Head Type SH-6-A, W/ General Electric Motor W/18" OD Nipple, thread on anc OD Column, 3" Tubing, 1-15/16" Shaftin #20-2500 Bowls, I stage—16" OD Straine type 24"x12"
3514	1 Deep Well Pump & Line Starter	#3500 GPM at 50' Head equipped W/60 H 3PH-60 Cyc-Electric Motor and Westingho 11-200 Cross Line Starter
3515	2 Thor Sump Pumps	#361-T
3516	1 Ingersoll Rand Sump Pump	#10351

Asset Property  
Record  
Schedule Page

		Item	Description
III-B	3517	4—#4 Byron Jackson Sump Pumps	
	3518	1—Electric Sump Pump	Imperial #BA-2—60 cyc.
	3519	1—Kimball Krouth Vertical Pump	4"—New DPC-698—US 1½ HP Motor #261663 220/440V W/5'4" Suction Pipe
	3520	4—Sterling 1½" Stationary Gasoline Water Pumps	Pump Model 3M Engine Model RSC 2646 Serial #10302, #105340, #17434, and #14
	3521/27	Miscellaneous	Round Winches, Trolleys, Winding Engine, Desks, Tables, Chairs, etc.
III-D	3601 to 3708	Office Furniture Office Equipment Office Supplies	Typewriters, Calculators, Adding Machines, Trays, Baskets, etc.
		SUB-TOTALS	

2501-2 Pro-rata of Service Costs (For basis see notes on Summary Sheet)

TOTALS

	3	239.10	71.73	167.37
	3	2,060.29	618.09	1,442.20
	3	1,848.46	554.54	1,293.92
	3	300.00	90.00	210.00
	3	284.05	85.21	198.84

Installations (mechanical), etc.  
Page 3 of 3 Pages

Depreciation Years to 12-23-44	Original Cost	Depreciation at 10% per each year or fractional part thereof	Option Price as of 12/23/44
3	1,135.66	340.70	794.96
3	35.89	10.77	25.12
3	266.80	80.04	186.76
3	222.29	66.69	155.60
3	3,416.11	1,024.83	2,391.28
3	18,996.55	5,698.96	13,297.59
2	20,879.45	4,175.89	16,703.56
3	32,492.39	9,747.72	22,744.67
2	2,994.31	598.86	2,395.45
3	398.47	119.54	278.93
	\$550,527.74	\$153,310.58 (27.85%)	\$397,217.16
	52,495.30	14,619.94	37,875.36
	\$603,023.04	\$167,930.52	\$435,092.52

## (Defendants' Exhibit Q)

Option Price as of December 23, 1944 of the Facilities and Mac  
as Calculated by Gregory D. Smith from Assets-Property I  
of Defense Plant Corporation Under Lease Agreement be  
Defense Plant Corporation and Tavares Construction Co.  
dated December 27, 1941, and Amendments thereto.

## 3. Portable Durable Tools and Automotive Equipment

Asset Property Record Schedule Page	Item	Description
IV-A 4103-4225	Portable Durable Tools	Concrete Vibrators, Pneumatic and Electric saws, welding machines and torches, etc.
IV-B 4301	Automotive Equipment	5 Bicycles, Dayton, Balloon Tires
4302		2 Economy Model Auto Glides #97984, 9803
4303		2 Glides W/pass. Side Cars #97887 #97892
4304		1—8 cylinder 90 HP Ford Super Deluxe Sedan Four 600x16—4 ply tires & seat Motor No. 18-6790526
4305		1—Ford 6 Deluxe Tudor Sedan Motor #1-0
4306		1—New 1942 Ford 6 Deluxe Tudor Sedan #1 GA-50962
4307		1—New 1942—8 cylinder Ford Pick-up Flor- FY-196 Motor #1 GC-66082
4308		1—8 cylinder 1942 Ford Pick-up Motor #1 0
4309		1—158"—90 HP Stake Truck equipped w/ ply tires (duals in rear) overload spring forced frame & special cooling Ford
4310		1—1½ Ton Flat Rack Ford Truck—158" HP equipped W/32x6-10 ply tires (duals overload springs, reinforced frame & spec ing system W/area signal & road lights #99-T-472742
		1—New 1942 Ford 1½ ton truck cab & ch HP 8 cylinder 158" platform equipped Ton ply tires all around duals in the re load springs—reinforced frame—long arm signal arm & clearance lights and standar ment, Motor #BB-18-6797158

Portable Durable Tools  
& Automotive Equipment  
Page 1 of 2 Pages

Item	Depreciation Years to 12/23/44	Original Cost	Depreciation at 25% per each year or fractional part thereof	Option Price as of 12/23/44
2	3	67,227.88	50,420.91	16,806.97
3	2	2,708.95	1,354.47	1,354.48
3	2	205.74	102.87	102.87
2	3	831.80	623.85	207.95
2	3	1,222.22	916.67	305.55
2	3	1,184.24	888.18	296.06
2	3	1,184.24	888.18	296.06
2	3	895.30	671.48	223.82
2	3	843.30	632.48	210.82
2	3	1,316.05	987.04	329.01
2	3	1,334.01	1,000.51	333.50
2	3	1,308.26	981.20	327.06

Asset Property Record Schedule Page	Item	Description
IV-B      4311      Automotive Equipment (Continued)		<p>4—KS-6H—International Trucks equipped following:</p> <p>Overload springs—fish plated frame 825x20 tires on Budd wheels—Duals in rear Boosters and reserve tank—2 long arms mirrors—arm woods hydraulic C-12—4 yard body yards ends and 3/16" Flooring—Woods 1 FICS cam and roller type hoist, 3—42" gates—clearance lights &amp; reflectors</p> <p>Serial Nos. 1004-KS-4502 A-1005-KS-66875 A-1006-KS-67374 A-1007-KS-67721</p>
4312		<p>1—SK—6 H. International Truck equipped following:</p> <p>Serial No. K-S-6-6377—Overload spring fish frame 825x20—10 ply tires on Budd wheel in rear—Rooster brakes and reserve Tanks arm mirrors 1 signal arm—Woods 1 C-12"—4 Yd body W/5 Yard ends and flooring—Woods hydraulic FICS Cam and roller type hoist—3-42" Batch Gates—Clearance reflectors</p>

## SUB-TOTALS

2501-2 Pro-rata of Service Costs (For basis see notes on Summary Sheet)

## TOTALS

Portable Durable Tools  
& Automotive Equipment  
Page 2 of 2 Pages

	Depreciation Years to 12-23-44	Original Cost	Depreciation at 25% per each year or fractional part thereof	Option Price as of 12/23/44
3	2	11,948.00	5,974.00	5,974.00
		2,987.00	1,493.50	1,493.50
		\$ 95,196.99	\$66,935.34 (70.31%)	\$28,261.65
		9,077.46	6,382.36	2,695.10
		<u>\$104,274.45</u>	<u>\$73,317.70</u>	<u>\$30,956.75</u>

(Defendants' Exhibit Q)

Option Price as of December 23, 1944 of the Facilities and Mac  
as Calculated by Gregory D. Smith from Assets-Property I  
of Defense Plant Corporation Under Lease Agreement b  
Defense Plant Corporation and Tavares Construction Co  
dated December 27, 1941, and Amendments thereto.

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SUMMARY SHEET

Proration of Service Costs was arrived at by dividing total service costs of \$2  
by total direct cost of \$2,471,431.98 and multiplying direct costs under each  
by the resulting percentage (9.53545%).

Depreciation on Service Costs was calculated at the same percentage that depreciati  
each schedule bears to original direct cost under each schedule. This perce  
shown in parenthesis in depreciation column.

RECAPITULATION

Schedule 1. Buildings, Ways, Docks, Structures, Improvements (fencing, pavi  
tracks, etc.,) and Building Installations other than Mechanical

Schedule 2. Installations (mechanical), Movable Equipment, Cranes, Tools, M  
Shop Fixtures, Laboratory and Test Equipment, Furniture and  
Loading and Lifting Trucks, etc.

Schedule 3. Portable Durable Tools and Automotive Equipment

GRAND TOTALS

\* From the option price of \$2,193,075.19 a deduction should be made in the  
amount of \$51,838.70 for work done at that portion of the original site  
which was later abandoned for use by the Navy and, therefore, is not  
included in the site subject to the option.....

NET

No. 248. U. S. A. vs. Land. Deft. Exhibit No. Q. Filed 2/19/47. Edmund  
Clerk; By P. D. Hooser, Deputy Clerk.

[Endorsed]: Filed Feb. 29, 1947. Edmund L. Smith,  
Clerk. [1277]

	Original Cost	Depreciation	Option Price
Costs e Costs	\$ 1,825,707.25	\$249,025.03	\$ 1,576,682.22
	174,089.50	23,745.80	150,343.70
	<hr/>	<hr/>	<hr/>
	\$ 1,999,796.75	\$272,770.83	\$ 1,727,025.92
Costs e Costs	\$ 550,527.74	\$153,310.58	\$ 397,217.16
	52,495.30	14,619.94	37,875.36
	<hr/>	<hr/>	<hr/>
	\$ 603,023.04	\$167,930.52	\$ 435,092.52
Costs e Costs	\$ 95,196.99	\$ 66,935.34	\$ 28,261.65
	9,077.46	6,382.36	2,695.10
	<hr/>	<hr/>	<hr/>
Costs e Costs	\$ 104,274.45	\$ 73,317.70	\$ 30,956.75
	\$2,471,431.98	\$469,270.95	\$2,002,161.03
	235,662.26	44,748.10	190,914.16
	<hr/>	<hr/>	<hr/>
	\$2,707,094.24	\$514,019.05	\$2,193,075.19*
	<hr/>	<hr/>	<hr/>
Costs e Costs	\$ 17,298.81		
	37,501.98		
	<hr/>		
	\$ 54,800.79		
	<hr/>		
Costs (9.5354%)	5,225.50		
	<hr/>		
	\$ 60,026.29 (13.64%)	\$ 8,187.59	\$ 51,838.70
	<hr/>		
	\$2,647,067.95	\$505,831.46	\$2,141,236.49
	<hr/>		

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
ON HEARING OF MOTION FOR NEW TRIAL. [1]

San Diego, California, Friday, June 6, 1947.

10:00 A. M.

The Court: Now, we will take up the lands case.

Mr. Berrey: I would like to present the judgment at this time, your Honor.

The Court: I have a copy of it and have read it over.

Mr. Berrey: The judgment has been approved by the government as to form subject to its objection, by the attorney for the Johnsons, by the attorney for National City, by the attorney for the San Francisco Bridge Company, by Leonard McLaughlin, and by the attorney for the County.

Mr. John M. Martin: If the court please, on behalf of the defendants Tavares Construction Company, et al., I want to very briefly object to the entry of the judgment on the ground it is not sustained by the record in this case. In order to make the grounds of my objection concise and very brief, I will state they are the same as those set forth in the motion for a new trial, the supporting affidavits and the memorandum of points and authorities, copies of which I have previously handed the court and government counsel. The only objection I would like to particularly direct the court's attention to at this time is that I feel that the issue of fact in this case have not been fully tried, having in mind particularly the fact that there was not submitted to the jury the issue of fact as to the date of the taking as to parcel A, ]3] and the jury made no determination, nor has the court made any determination of that fact, and I feel the issues of fact have not been fully tried.

The Court: Mr. Monroe, do you want to say anything on that phase of the case?

Mr. Monroe: That, your Honor, doesn't have to do with me. The only reason I am here is because the government served me with an objection to the form of the judgment, and I am here to answer that objection. That is all.

The Court: You think this proposed judgment is correct?

Mr. Monroe: I think it is correct.

The Court: What is the objection?

Mr. Berrey: The objection which we are presenting here, your Honor, is to that portion of the language in paragraph 5, that is on page 11 of the judgment, which provides for the payment at line 30, "together with interest at the rate of six per cent per annum on the sum of \$650,000 from November 10, 1942, the date the United States entered into possession thereof, to October 3, 1944, the date of the filing of Declaration of Taking No. 1 and of the deposit of \$106,240 in the Registry of this Court . . .".

It is our contention that inasmuch as there was no determination of the date of the taking of parcel A, that there is no support for the provision for payment of interest on that portion of the judgment which is apportioned to parcel A, that is, from November 10, 1942 to October 3, 1944.

We are presenting this objection as a precautionary [4] measure to protect our right in case the contemplated settlement with the City of National City should not be concluded.

The Court: What is the status of that?

Mr. Berrey: The status of that, as I understand it, is that the City Council has authorized the City Manager and the City Attorney to make the offer of settlement suggested by Mr. Dudley of the Navy Department. The formal resolution has not been received, but word has already gone forward to Washington of the proposal, and the machinery has commenced rolling to obtain the government's approval of the offer.

The Court: The last I heard was that the meeting had not been able to get a quorum, or get all of the members of the Board present.

Mr. Berrey: That was accomplished last Tuesday, your Honor. As I say, since then that information has been conveyed to Washington, to the Navy Department.

The Court: So that the Board did regularly meet, Mr. Monroe, in the past week?

Mr. Monroe: That is what I am informed, yes.

The Court: The City Attorney is here, and he probably knows. Mr. Campbell?

Mr. Edwin M. Campbell: Yes, that is a fact, your Honor.

The Court: Now, Mr. Monroe, if you want to say anything in response to counsel, you may do so.

Mr. Monroe: I am, of course, only interested in this [5] objection, and your Honor will recollect—

The Court: What page are you referring to in the transcript?

Mr. Monroe: First I have before me page 1260. It is the last volume, your Honor, the volume of February 27th, and it is the instructions to the jury. The court instructed the jury:

"With respect to such area the owners are entitled to recover the actual value of the land, that is to

say, the market value as of the time of the taking thereof by the United States Government, to-wit, on November 10, 1942."

That was the date which was fixed. Your Honor will recollect that was fixed over our objection. We were contending during the time that we should be permitted to introduce evidence of the value as of a later date, and it was held that November 10, 1942 was the deadline for the value.

Now, turning back to page 1257, it seems to me that as to parcel A the question was squarely presented to the jury as a question of fact. The court said at line 10:

"If you find that the condemnation and taking by plaintiff United States of America of Parcel A herein was a part of the same project for which the other lands herein have been condemned and taken by the United States of America, and that it was certain [6] on November 10, 1942 that Parcel A would be condemned and taken as a part of the same project for which the other lands herein condemned have been taken, then and in that event you must evaluate Parcel A in the same manner and use the same date of valuation as if Parcel A had been included in the original complaint for condemnation filed herein November 10, 1942."

So the decision of the jury fixing that is clearly a decision of fact in the case. I think the matter was squarely presented. Had we been permitted to put in evidence as to values subsequent to that date, we would have produced evidence of value considerably in excess of the value which was shown, but your Honor ruled that November

10th was the date, and our evidence was brought in as of that date. That date was submitted to the jury, and I see no reason why the judgment should not reflect exactly what took place and exactly what date the valuation was fixed at.

The Court: I think so, with respect to all of the interests except possibly the Tavares' interests. I notice that Mr. Martin here made mention of a conversation he had with the judge of the court in chambers with respect to that matter that there was evidence that to the mind of the court, so far as the Tavares interests were concerned indicated that there might have been some little variation, in so far as the [7] introduction as to parcel A, which was the submerged portion of the project, as to the date of taking with respect to any interests that the Tavares litigants may have had. But as to the taking itself, so far as the other interests were concerned, those who were seeking just compensation for the taking of either real property or submerged property, or property of a type that would be connected with the terrain itself, or with the waters themselves, as distinguished from the Tavares interests, I felt that there was a factual question there that should be covered by the instruction, and that was the reason that I gave the instruction which you have just called to the Court's attention on page 1257 of the transcript.

I think so far as the judgment is concerned that the date, November 10, 1942, should be the date concerning which interest matters are to be assessed, in so far as the recoveries that were included in the findings of the jury as concerned. The objection of the government will be overruled.

Mr. Monroe: I wonder, your Honor, might counsel for National City then be excused? I take it we have nothing to do with the other matter.

Mr. Sloane: And may that also be true of counsel for the San Francisco Bridge Company?

The Court: I think so.

Mr. John M. Martin: May we note an exception to the ruling, your Honor? [8]

The Court: Yes.

Just a moment. Is this the original of the judgment?

Mr. Berrey: That is the original which I presented to your Honor.

The Court: You have seen it, Mr. Monroe, have you?

Mr. Monroe: Yes, I have examined it. I think it is in good shape.

The Court: The judgment will be accordingly signed. I want to say one thing more before I sign it. I have not checked the computation of these various items. I assume you have all done so.

Mr. Monroe: I think they are correct, your Honor.

Mr. John M. Martin: If the court please, before other counsel leave I would like to have them stipulate that the motion for new trial, which I am presenting on behalf of Tavares, et al., may be heard at this time. We are in a consolidated situation here, where I don't know whether any of them want to be present or not.

The Court: Apparently Mr. Monroe has suggested, and Mr. Sloane also, and I saw Mr. Campbell assent with a nod of his head, that they don't care to be present.

Mr. John M. Martin: Very well.

Mr. Monroe: I see no reason why we should take part in the argument.

Mr. John M. Martin: I just wanted them to know I am going [9] to present a motion for a new trial today, and they may satisfy their own pleasure.

The Court: And the court is here to hear your motion for a new trial.

Mr. Monroe: As I understand it, a new trial might be granted as to them and not as to us.

The Court: That is right.

Mr. Monroe: And it might take such form that the court would decide the motion for new trial had to be granted as to everybody, which we couldn't help even if we were here, and I see no reason why we should take part in the argument.

The Court: I don't either, gentlemen.

Mr. Sloane: That is right. I had counted on two days, but if I am not allowed that, I will depart, your Honor.

(Thereupon counsel for the defendant, City of National City, and for the defendant, San Francisco Bridge Company, retired from the court room.)

The Court: You may proceed, Mr. Martin.

Mr. John M. Martin: If the court please, I would like at the proper time to file the original of the motion for the new trial, the affidavits and memorandum of points and authorities, and I would like to have the record show they are filed subsequent to the entry of the judgment which your Honor has just signed.

The Court: So ordered. [10]

(The documents referred to were filed.)

The Court: I have read the motion for a new trial, the supporting affidavits and the memorandum, so that you

need not take up any time in reviewing those matters, unless you desire to do so in your argument. Proceed.

Mr. Crouch: Your Honor, please, I will devote my argument to the presentation of two points; first, that there were additional instructions which should have been given to the jury, and second, that certain of the instructions which were given to the jury were erroneous.

I have no temerity in arguing these contentions because of the feeling that the court might have that I had a very low opinion of its legal ability, because this court knows that for over thirty-five years I have had an entirely different opinion, and through all of the years commencing at a time when we were both somewhat younger boys than we are today.

To my mind these errors are due to the fact that perhaps all of us were endeavoring to find something for use in this case when in the reported decisions there was no case like this one. I think it is quite evident that all of us were laboring in the dark in seeking to find the true rule for the assessment of damages to our client. That is I think quite apparent from the record, from statements by counsel, as well as by the court, and I think that it is also true that because this jury were also in the dark and were left in the dark until [11] the court instructed them and gave them a rule, that the reason why the verdict was zero as to our client was because the jury felt that it was their duty, as it was, to follow that rule.

Now, it is fundamental that under the Fifth Amendment to the Constitution of the United States private property cannot be taken for public use without the payment of just compensation, and this case was all about and devoted to an effort to find what in this particular situa-

tion was just compensation. Of necessity, from the record some compensation should have been awarded. The case was in that state before the jury was ever empaneled, before your Honor was ever requested to sit in it, because the ruling of Judge Yankwich on pre-trial, under the law, becomes a part of the judgment, which your Honor was obligated to follow, and on the 10th day of October, 1946 in Judge Yankwich's ruling on the pre-trial hearing as to the interests of the Tavares Construction Company, he specifically answered two questions:

(a) Have the lease and option rights of the Tavares Construction Company been taken and condemned in this action?

His answer was in the affirmative.

(b) Does the defendant, Tavares Construction Company, have a compensable interest in the property taken by the condemnation proceeding?

The court answered affirmatively. [12]

Now, you cannot compensate anybody by giving them zero. I don't need to argue on that point. The mere making of it shows that there is no answer to it. I might, however, although I almost feel like I am insulting the intelligence of the court when I do it, tell you what Webster says is the definition of the word "compensation."

Here are some synonyms: to remunerate; to make up for; to make amends for; to recompense; to counterbalance.

Suppose the rights of the Tavares Construction Company were put on one side of the scales. Could you counterbalance them by putting zero on the other side of the scale? Suppose we paraphrase Judge Yankwich's pre-trial ruling, and the question had been: As to the lease and option of the Tavares Construction Company in this

case, should they be compensated for it, should they be remunerated for it, should the government have given them something to make up for it, to make amends for it? And suppose Judge Yankwich had said, "Yes." It could not be any stronger than it is. That is the record.

Now, the erroneous instruction or instructions, because it occurred twice, that I refer to are found on pages 1263 and 1266 of the transcript. I read from your Honor's instructions:

"The interest of the Tavares Construction Company and its associates arises out of an instrument which is in evidence as Defendants' Exhibit W . . . ; [13] you are to determine what is the fair market value of the interest arising out of such instrument . . . ."

The Court: Pardon me, Mr. Crouch. I do not find that yet.

Mr. Crouch: I am reading from page 1263.

The Court: I have that page. What line are you commencing on?

Mr. Crouch: Line 5.

The Court: Line 5. You have the original instructions, I take it. Are you reading from that, or are you reading from the transcript?

Mr. Crouch. I am reading from the transcript.

The Court: The transcript commencing on line 5, page 1263, is, "to wit, what is the amount," and so forth.

Mr. Crouch: Well, the first one, your Honor, was on page 1263 of the transcript.

The Court: Page 1263. That is what I have.

Mr. Crouch: Line 5.

The Court: I will hand this to you. It may not be a correct copy.

Mr. Crouch: Yes. (Indicating)

The Court: I see. Right after the comma. I understand.

Mr. Crouch: Reading from line 5:

"to-wit, what is the amount for which the interest [14] of said Tavares Construction Company and its associates under said instrument of agreement could have been sold for on the open market for cash on December 23, 1944, the date it was taken or canceled by this proceeding or within a reasonable time thereafter; and in this connection if you find that the interest of the Tavares Construction and its associates under said instrument of agreement is so speculative and conjectural that no purchaser in the open market would have purchased the same except for a nominal consideration then your verdict as to the interest of the Tavares Construction Company and the Concrete Ship Constructors herein must be in a nominal figure only."

And on page 1266, line 5:

"If you find the company could have made such a sale your verdict will be for the amount you in your judgment determine the company could have gotten for it. You will consider the entire instrument, not just parts of it. If you find it could not have been sold, then your verdict as to Tavares Construction Company, Inc. will be zero."

I do not believe that is the law. Throughout this case various remarks were made by the court which indicated that it [15] had given serious study to the Miller case, and, in fact, to my mind the Miller case goes the farthest

in shedding light on these cases of any of them that I have read. But that case did not go far enough to fit this case.

Now, what I am trying to do, your Honor, this morning is to convince you that it was your duty, and still is your duty, to make some law in this case. This is a court of equity. This is an equitable proceeding. This court knows the history of courts of equity, and how they came into being. They were born because of the rigours of the common law. They grew out of and because of the injustices of the application of the rules of common law in England to peculiar cases, creating great hardships and inequities and injustices, because there was nothing under the common law by which they could do otherwise, and so the court's King's Bench got to taking cognizance of these peculiar cases, and they tried to find a writ, and they would issue a writ, and when they had a case where they found that they never had issued a writ in a similar case to guide them, they invented a new writ. That is to the credit of the courts of equity of England, and of the United States, and let me lay a fitting tribute at the feet of those courts of equity in this land of ours, because they have always been guided by the desire in every case to see that justice shall be done, notwithstanding the letter of the law, and totally irrespective of whether there was any precedent [16] for their action.

I started to talk about this Miller case and got off the track, because when your heart is full, your Honor, you will boil over once in a while. Now, the Miller case recognized that there might be cases where the rule laid down there would not apply, couldn't be used, and we all overlooked that. I read from the decision as reported in

87 Law. Ed. at page 342, the opinion written by Justice Roberts:

"The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good condition pecuniarily as he would have occupied if his property had not been taken.

"It is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose."

In other words, the court says there is no yardstick that will measure every right that is taken.

"In an effort, however, to find some practical standard, the courts early adopted, and have retained, the concept of market value. The owner [17] has been said to be entitled to the 'value,' the 'market value,' and the 'fair market value' of what is taken. The term 'fair' hardly adds anything to the phrase 'market value,' which denotes what 'it fairly may be believed that a purchaser in fair market conditions would have given,' . . . .

"Respondents correctly say that value is to be ascertained as of the date of taking. But they insist that no element which goes to make up value as at that moment is to be discarded or eliminated. We think the proposition is too broadly stated."

Now, here is the text of my sermon, and my entire morning discourse is to be on that text. It isn't in the Bible, but it is in the next best thing to it:

"Where, for any reason, property has no market, resort must be had to other data to ascertain its value; . . ."

Yet your Honor instructed the jury that if they did not believe that lease or contract could be sold on the market, their verdict should be zero. You told them that twice. And when the jury still couldn't get it through their heads, they came back for further instructions, and they didn't get any more light. You just reread those same things to them.

Now, I can appreciate your Honor's reason for that. You probably have found out from bitter experience of time that [18] when juries come back and you attempt informally to restate in other language the rules of law that you have already given them, you are liable to make a slip and get in something so they will reverse the case on you. So I can forgive you for that. But they wanted more light. They were confused.

Now, they had been told by the expert witnesses for the government that there wasn't any market for it. Mr. Landrum put those witnesses on, and I guess that the government is bound by their testimony. So we had a case before we ever instructed the jury, and before they ever started their deliberations, we had a case, so far as the government was concerned, where we had something for the jury to evaluate by the application of the market value rule in a case where there wasn't any market value.

There are lots of things in this world that are property within the Fifth Amendment to the Constitution of the

United States that have no market value. What could you get for your face on the open market? Much more than I could get for mine, but how many thousands of dollars of damages have juries awarded in this country because people disfigured a human face. Can you sell the pain and suffering that you endure when somebody disfigures your face? No. There is no market for it. It is peculiar, but your damages can be enhanced by such amount as, under all the circumstances of the case, the jury thinks is a fair compensation for the pain and the suffering which [19] you endure.

I have no doubt in the world that I could search through the instructions that your Honor has given to juries when you sat upon the Superior Court bench, and find one just about like this:

By the very nature of things the law can furnish you no accurate measure whereby you can determine in dollars and cents the exact amount to be awarded for pain and suffering in personal injury cases. Such amount, of necessity, must be left to the good sense and sound judgment of the jury, and your verdict should be in such amount as under all the circumstances in the case you deem just.

The Supreme Court of California has held that the right to practice law is property. What could you get on the open market for your right to practice law? And yet from anybody who illegally takes away from you your right to practice law, under the Fifth Amendment to the Constitution of the United States you can secure damages.

What could you sell for on the open market, or what could your wife sell for on the open market, your affections for her? But I got \$100,000 in cold hard cash

from a jury in a case where a woman alienated the affections of a husband from a wife. [20]

There is no yardstick that you can apply in any of those cases, any more than there was any yardstick that you could apply to the amount which the jury should have awarded in this case, under all the circumstances, to the Tavares Construction Company.

You invent a new and a secret method of making atomic bombs. You spend years of your life, and thousands of dollars of your money in developing that secret. The government starts to condemn it. How much could it be sold for in San Diego on the open market, or anywhere? Yet it is property, and if the United States Government desires it, it should recompense you for it, reimburse you for it, give you such amount as, under all the circumstances of the case, the jury thinks would be fair.

They didn't have that chance in this case.

Now, that is not the only time the Supreme Court intimated that at some time there might be a case where you could not measure the damages by a yardstick.

In *United States v. New River Colliers Company* in the 67 Law. Ed., in the Syllabus at page 1014 I read:

"The owner of property taken by the United States for war purposes is entitled to the full money equivalent of the property taken, and, therefore, to be put in as good position pecuniarily as it would have occupied if its property had not been taken."

And in Syllabus 3:

"The ascertainment of compensation to be paid by the government for property taken is a judicial function, and no power exists in any other depart-

ment of government to declare what the compensation shall be or to prescribe any binding rule."

And Syllabus 4:

"Where private property is taken for public use and there is a market price prevailing at the time and place of the taking, that price is just compensation."

Which is a correct statement of the law, and which also holds this, that in cases where at the time of the taking for public use there is no market price prevailing, some other rule must be used to determine the amount that will compensate the defendant.

I read from the case of *Monongahela Navigation Co. v. U. S.*, 37 Law Ed. 463, Syllabus 1:

"The compensation for private property taken for public use must, under the Fifth Amendment to the Constitution, be a full and perfect equivalent for the property taken."

And reading from the decision of Mr. Justice Brewer on page 467: [22]

"\* \* \* It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

I don't know what that last means. Make a note of it for me to look it up. Thank you.

"The language used in the 5th Amendment in respect to this matter is happily chosen. The entire Amendment is a series of negations, denials of right or power in the government, the last, the one in point here, being 'Nor shall private property be taken for

public use without just compensation.' The noun 'compensation,' standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just.' There can, in view of [24] the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken."

Now, this whole law suit was predicated upon the proposition that the Tavares Construction Company's lease and option, and the possession under it, was compensable. That, of necessity and irrespective of whether it could be sold anywhere, means they were entitled to be paid and remunerated and be given money enough to recompense them. Why, they were in possession, with all their furniture, desks, and instruments and drafting boards, under a lease that had five years yet to run. Tell me of any judgment of any jury or of any court that will stand for a zero award for that valuable property to them. And they don't care whether or not anybody else wanted it or could use it, or whether it could be sold or couldn't be sold. We get right behind the Fifth Amendment to the Constitution of the United States and say to you and to the jury, "You can't do it." And we say to you that

you shouldn't wait, but that it is your duty here and now to see that this case is submitted to a jury under such appropriate instructions that they can give at least something.

And I read this sentence from the decision of Justice Brewer in the Monongahela case, as appears on page 472:

"Whatever be the true value of that which it takes from the individual owner must be paid to him [24] before it can be said that just compensation for the property has been made."

I read from the case of *Olson v. United States*, 78 Law Edition, page 1244:

"The rule prescribed by the Minnesota Constitution is not, at least so far as concerns these cases, to be distinguished from that expressed by the just compensation clause of the Fifth Amendment and implied in the due process clause of the Fourteenth Amendment to the Federal Constitution. The judicial ascertainment of the amount that shall be paid to the owner of private property taken for public use through exertion of the sovereign power of eminent domain is always a matter of importance for, as said in *Monongahela Navigation Co. v. United States*, . . .: 'In any society the fulness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government.' The statement in that opinion . . . that 'no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner' aptly expresses the scope of the constitutional safeguard against the [25] uncom-

pensated taking or use of private property for public purposes."

And speaking of the amount:

"He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more."

Then on page 1245 we have, as shown in this case, a situation where they could not use the market value rule. That is indicated by the following language:

"Flowage easements upon these lands were not currently bought or sold to such an extent as to establish prevailing prices, at or as of the time of the expropriation. As that measure"—citing this New River Colliers case that I read from a moment ago—"is lacking, the market value must be estimated."

That is, you must assume that it had a market value, and we think the jury should have been given an instruction something like this, particularly in view of the fact that the government's expert witnesses based their appraisal of zero largely or wholly upon the fact that nobody would buy it, because of the various reasons which I will advert to later on:

If you find or believe that there was no market for this lease and option, you should attempt to determine the amount of the damages [26] to the Tavares Construction Company by some other rule which I will now give you, and should disregard the one which I have given you as to what the property could have been sold for on the open market; and if you believe from the evidence that the property could not have been sold upon the open market, then your verdict

should be in such amount as, under all of the circumstances of the case, will justly compensate the Tavares Construction Company.

The Court: May I ask a question there?

Mr. Crouch: Yes, your Honor.

The Court: Where is the measure?

Mr. Crouch: Pardon me?

The Court: Where would be the measure?

Mr. Crouch: Just the same measure as if somebody disfigured your face?

The Court: In other words, you argue that the measure of compensation in eminent domain cases is the same as that in tort cases?

Mr. Crouch: Absolutely, and that is what I am trying to get your Honor to hold in this case. The jury would be entitled to have all the light thrown upon that in making that award, all of the facts and circumstances, the uses to which the plant could have been put for the length of time the [27] lease had to run, the amount which they would have had to have paid to the government in case they did exercise their option, and each and every element and factor should be given to the jury and they should have been told that if you find that this is a case where there is no market value, then you must assess such sum as, under all the facts and circumstances, you think will adequately compensate the Tavares Construction Company for the value of the property taken.

Now, if that is not the law, then I say in three decisions of the Supreme Court that I have just handed to you they were talking about a situation and a rule which should be applied in this case and didn't know what they were talking about. And I have never read a decision of Justice Brewer where he didn't know what he was talking about.

Those three decisions of the Supreme Court of the United States say that if you have a case where there is a market value, then you apply it.

Now, you ask me how are you going to measure it, and what measure are you going to use? Well, if you can think of some other measure that should be used, admitting that the market value does not apply, use it, use anything, except it must all have been predicated upon full reimbursement, full recompense. That is the trouble with this whole case. The court was laboring under the impression that it had to have a measure, and so it took a measure that the Supreme Court [28] itself indicates is lacking, and which the record shows in this case and the government's witnesses themselves testified was lacking. Can you think of a better way to do justice in this court of equity than the one that I have suggested? Then, if so, it is the duty of the court to invent it and apply it, because by the instructions in this case you are doing the very thing that common law courts in England did that caused the injustices when courts of equity were created for the purpose of making rules in peculiar cases. And if this isn't a peculiar case, I never saw one. On page 1255 of the record here is what was told the jury they had to do:

“\* \* \* The question for you to consider is this —if the defendants had desired to sell the property taken from them by the government, what could they have obtained for it upon the market, \* \* \*?”

Page 1251:

“\* \* \* You are to determine and award to the defendants as the market value of the land that price which they could reasonably expect to have received for the property in a sale upon the open market;  
\* \* \*”

Page 1255:

“\* \* \* The question for you to consider is this: —if the defendants had desired to sell [29] the property taken from them by the government, what could they have obtained for it upon the open market,  
\* \* \*

“\* \* \* The inquiry in the case must be: What is the property reasonably worth in the market,  
\* \* \*

“In determining the fair market value of lands taken, the just compensation to the owner is that sum of money which, considering all the circumstances disclosed by the evidence, could have been obtained for the lands by an informed seller offering them in the open market for cash.”

No wonder the jury brought in a verdict for zero. Our witnesses testified it could have been sold for so much, but the jury didn't believe them. The government witnesses said it couldn't have been sold at all. Well, it is a poor rule that does not work both ways. Why didn't you apply it to National City? Why did you give an instruction that only applied to the Tavares Construction Company? Why didn't you tell the jury that if you believe that the lease of the City of National City could not be sold upon the open market your verdict should be zero? And why didn't you tell the jury that under the law the lease could not be sold? Why send a jury out at all? Why pick out and apply that zero instruction just to the Tavares Construction? Why not give to the Tavares [30] Construction Company the same consideration that was given by the court in its instructions as to the City of National City? We all know that under the Tidelands

Act the leasehold interests of National City could not be sold. Why, Mr. Hotchkiss, and Mr. Anewalt and Mr. Bleifuss, our expert witnesses,—we could not have got a one of them to go on the stand and to swear that anyone could have taken the National City lease and go out on the open market anywhere in the world and have gotten five cents for it. Why? Because they would have known that would be violating the law, that they would have been violating the law by purchasing it. So you had to have some other criterion to measure the award. Why didn't you give us the same kind of consideration? Why weren't we entitled, under the law, to have the same rule of law applied to us as was applied to National City?

Now, if you would have given the same instruction as to National City's case that you gave as to the Tavares Construction Company's case, and the jury had followed your Honor's instructions, as we know they would have, nobody would have gotten a cent. I don't need to argue that, your Honor. You know it. Do you think that would comply with the Fifth Amendment to the Constitution of the United States? No, because under the Miller decision, and the Monongahela decision, and the Collier decision, and others, whenever you have a case where there is no market value, you can't use the market value [31] rule, then you must adopt some other measure.

Now, it isn't up to me. You asked me about the measure. It isn't up to me. That is your duty. That is your question, as they say. Of course, it is a part of my duty to give you all the aid I can as to the proper state of the law, and I confess I was remiss in that duty, but that is no cause for upholding an erroneous judgment and an unjust judgment, because I know this jury wanted to give us

something. They felt they couldn't, and follow the oath that they took when they were sworn.

Now, I call your attention, and I have said it was a poor rule that didn't work both ways, to page 1261 of the record, where you were instructing regarding the rights of the eight parcels owned by National City. I mean page 1260, line 9:

"The owners of property which is taken in a condemnation proceeding are entitled to recover an award of money for the taking of their property. With regard to the eight parcels of land owned by the defendant, National City, it is not claimed that there was any detriment suffered other than by reason of the taking of the described parcels; and therefore as to these parcels the owners are to be awarded that amount which will justly compensate them for the taking of such parcels. With respect [32] to such area the owners,"—I will skip down to line 20. "The market value is the highest price in terms of money which the land will bring if exposed for sale in the open market with a reasonable time allowed to find a purchaser, buying with knowledge of all the uses and purposes to which the land is adaptable and for which it is capable of being used. This contemplates a sale to be made in a reasonable time to a purchaser who is willing to pay what the land is fairly worth. . . ."

Why didn't you give the same kind of an instruction as to the Tavares Construction Company? Why didn't you tell the jury with reference to the Tavares Construction Company that the law contemplates in this a sale, as it does? We were entitled to have this jury told that they

must assume that there was a purchaser, and that if you find there was no purchaser, then you cannot bring in a verdict for zero for that reason alone, because in such an event you must assume that there was a purchaser who was willing to pay the fair market value of what it was worth. Now, you gave them that rule in the National City case correctly, but you told the jury that if they didn't think ours could be sold, the verdict should be zero. And with a proper instruction in the National City case, in a case where everybody knows it could not be sold, the verdict was \$750,000, and that is just the difference. In [33] one case they have got the law. In the other case, they didn't get the law, as I see it. I think in this case that the jury was left entirely in the dark, or largely in the dark, because of the fact that the attorneys for one side claim that the lease and contract meant one thing, and the attorneys on the other side said the lease and contract meant another thing. So all through the direct examination and the cross examination of the witnesses, both for the government and for us, it was a fight to see which attorneys would be most successful in getting the jury to agree with them on the interpretation of this lease and contract, and we think that the court should have interpreted this lease and contract, and not have left it to the witnesses and to the lawyers, and to the jury when they got out in the jury room, particularly when you told them on page 1246 that they had no right to consider the legal questions. I will make a guess. I wasn't in the jury room, I wasn't even a little mouse, but I would be willing

to make a guess that three-fourths of the time the jury were out they were talking about legal questions and trying to see what the contract meant, and what the rights of the Tavares Construction were under that contract, whether or not under that cancelable provision in it they could be canceled out at any time by the government. They had that all before them until they went out, and they were trying to figure out what the contract meant, and they don't know yet what it meant. [34]

And counsel for the government tried to mislead them in his argument as to what is meant, trying to get them to bring in a verdict for zero because this contract had so many "ifs, ands and buts" in it, so that nobody would have anything to do with it. That left the jury confused and wondering who was right and who was wrong. When attorneys for one side present their case before a jury on the theory of their interpretation of the contract being the correct one, and the attorneys for the defendant present their case to the jury on the theory that their interpretation of the contract is the correct one, it thereupon, in my humble opinion, becomes the duty of the trial judge to tell the jury what is a correct interpretation of the contract, and that was never done in this case.

Let me show you how they functioned on that phase of the case throughout the trial. Let's look at Mr. Mason's testimony on page 1010, line 9:

"A. Yes; as I stated yesterday, the Tavares Construction Company had the right under this lease, as

I interpreted it, to have it free of rent if and only if they were constructing boats for the government."

The jury does not know. They are not lawyers. I submit the court should have told them whether he was right or whether he was wrong. Take the witness Mason at page 1017: [35]

"A. If I understand your question correctly, you want to know if I considered whether the word 'expiration' in paragraph 15 would be applicable to the date of 1947 and 1949?"

The witness made his own application. Counsel made his own application. The jury never were told who was right and who was wrong. That would make a difference in the value of this lease. Page 1018, the witness Mason:

"Q. What was your understanding of the contract provision as to that still being the date of termination \* \* \*?"

That is an improper question. I probably should have objected to it, but I have found, to my sorrow, that when trying a case before a jury, you start objecting and the jury gets the idea you are trying to make something out of it, and they magnify it so it is worse than if you let it go in. That is a legal question, of the jury's understanding of that lease and contract. There is no evidence in this case except perhaps, it is feared, that he based his valuation on the wrong interpretation of the contract. And

you could strike all of his testimony out. Then he says on line 12:

"It is my understanding of that particular phase that the Tavares Construction Company did have an interest to that date but, in my opinion, it was not valuable and was not marketable and, [36] therefore, had no value."

Page 1021, line 21:

"Again repeating what I said a minute ago, if they transfer their rights from the Defense Plant Corporation to another governmental agency, that other governmental agency has to assume the responsibility of the Defense Plant Corporation until some provision came up whereby that was denied them, and Tavares would have the right to cancel under the 10-day notice, as I see it."

The witness is telling the jury how to interpret the contract. Page 1044, line 9:

"The element of certain rights coming into being;" —now, all the while throughout this case, throughout the government witnesses and through the argument of government counsel they were trying to get this jury convinced that this option wasn't worth anything because it never came into being.—"The element of certain rights coming into being; for example, the right to remain on the property, the right to an option. That was speculative. As evidenced in this court, it was cut off on December 23rd in a condemnation action."

They were trying to get the jury to believe that our option wasn't of any value because it was cut off when the [37] government took it over.

Now, to show you that is what the witness believed, and counsel for the government did not correct him, he allowed at least this misapprehension to go to the jury, the government's witness said on page 1046, line 22:

"I mean that the option had not come into being."

May I suspend now, your Honor.

The Court: How much longer are you going to take?

Mr. Crouch: How much longer do I have, your Honor?

The Court: You have been talking about an hour and three-quarters. It lacks that by about four minutes.

Mr. Crouch: A half hour more, your Honor.

The Court: Gentlemen, I will have to ask you now, because the argument may proceed beyond the limitations of one day, unless I safeguard it, as I can see, how much time do you think both of you will take?

Mr. John M. Martin: I understood you to limit all of the defense to three hours. When that three hours is consumed, we will stop. We expect to abide by that decision.

The Court: So long as you have that in mind.

Mr. John M. Martin: We had it in mind, yes, your Honor.

The Court: Then I think we will meet at 2:00 o'clock.

(Whereupon, at 12:00 o'clock noon a recess was taken until 2:00 o'clock p. m. of the same day.) [38]

Los Angeles, California, Friday, June 6, 1947. 2:00 o'clock P. M.

The Court: You may proceed.

Mr. Crouch: On page 1047 of the transcript of the record we have the witness Mason saying to the jury:

"I mean that the option had not come into being; that Tavares did not exercise an option on December 23rd or prior thereto, that is, exercising any rights that he might have had to an option prior to the date of valuation herein. He did not take those steps necessary to give him the option."

Now, some of the jurors believed that. The court never, if I remember the record correctly, instructed them on that point.

Then on page 1043 counsel for the government got the witness to testify concerning the valuation of this lease and contract that there were so many ifs, ands and possibilities that, therefore, it hadn't any value.

Now, let's take the other government witness, Mr. Shattuck. Let's see how he convinced the jury that they should interpret this contract and lease. On page 917 of the record, at the bottom of the page, Mr. Shattuck tells the jury that this option could only come under one of two conditions, in order to come into existence. Well, it was in existence all the time. It was in existence, the option was, [39] at the time the government took possession. He told them that "in my opinion, only under one of two conditions, and if neither one of those two conditions came about and the government elected to go ahead under clause (b) of paragraph Fourteen, then they would have no option, as I see it."

I expect there was a lot of argument in the jury room as to whether we even had an option, or whether we didn't have an option.

Then on page 935 he says:

"With relation to the leasehold interest, it was my opinion that the terms of it were very uncertain and conjectural."

The court should have instructed the jury, I submit, that there was nothing uncertain or conjectural in the lease. There were no ambiguities in that lease and contract. There were possibilities of this or that not happening, but there was nothing uncertain or conjectural in the lease. The rights of the government were exceedingly definite and fixed, as well as our rights. I think the jury would have been helped then, in arriving at the verdict, had the court explained to them and told them what the rights of the respective parties were.

Then on line 16 of the same page Mr. Shattuck tells the jury that the lease could be canceled and no option could be had. That does not mean that if the lease was canceled that we weren't entitled to compensation for the value of the [40] option. But I know a lot of the jurors thought that, and that that was one of the arguments in the jury room.

On page 938 Mr. Shattuck says, at line 25:

"Well, it is my opinion that the whole thing was too speculative and conjectural."

At page 952 Mr. Shattuck was asked:

"So it is your understanding that under the lease the government had a right, through exercising its priority rights therein granted, to merely take over

and use this property, and thereby end and terminate all rights of Concrete Ship Constructors?"

Now, I personally know that a lot of the jurors believed that. They thought that under that clause in the lease, when the government took possession it put us out so far as any option was concerned, or so far as being entitled to receive any payment for it is concerned. And that is what Shattuck was trying to sell this jury. In fact, he says, "I don't think there is any question about it."

Well, that is a legal question; not a factual question. But he is trying to sell this jury on the idea that when the government took possession there, that under the contract they had a right to cut off all rights we had under the contract, under the option. Yes, that is true. But they also thought and they were told by Mr. Landrum, if I remember correctly, that when the government did that out of the window goes our [41] option and out of the window goes our right to compensation for it.

Now, I said some pretty mean things about counsel for the government in my address to the jury, because I could see just what he was doing. Now I want to pay him a compliment. I said he was trying to fool and mislead and confuse the jury. Now the compliment is, "You did a pretty good job."

Page 956:

"And is it your understanding that upon the expiration of the term ending December 31, 1949, that the lessee could on January 1, 1950 have elected to purchase?

"A. No, he could not; not in my opinion."

A legal question. Page 959, and this is Mr. Shattuck testifying at line 4:

"Well, it may be that your question of why illustrates why I think this lease, coupled with an option has no price in the open market, for the reason that it is so conjectural and subject to so many interpretations and is so speculative that I don't believe any informed purchaser would dare to buy it."

Well, the jury believed that. They couldn't understand it. They were not lawyers. But if the court had told them what the lease meant and what the rights of the respective [42] parties were, in appropriate instructions, they would have followed that. They would have said, "Why, the court has told us what this lease is, and what the rights of the Tavares Construction Company are."

And they would have believed the court, and not Mr. Shattuck and Mr. Mason. As it was, they were privileged to believe Mr. Shattuck and Mr. Mason.

Now, another point that counsel got not only the witnesses to testify to, but alluded to it in his argument, was that it had no value because there was a clause in it that prohibited sale or transfer without getting the permission of the government and that, therefore, it had no value.

Well, now, the estate tax law of the Federal Government, Section 811, in defining what property shall be taxed as property of the estate in the event of the death of the owner, says:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situate outside of the United States."

Now, this court knows that there are a great many people who are the owners of valuable leases with clauses in them prohibiting assignment without the consent of the owner. Do you think for a minute that the Federal Government, in the [43] event a man dies holding such a valuable lease, or that the courts or appraisers or the Treasury Department wouldn't make them pay taxes on it? Why, there are Treasury regulations on the subject. They are to the effect that the government assumes that the assent could be obtained, and had Mr. Tavares died while this lease and option was in effect his estate would have had to pay estate taxes on that leasehold, the full value of the leasehold, and the government appraisers would have fixed that value, irrespective of that provision in the lease which prohibited assignment without consent, and irrespective of whether or not there was in the market a purchaser, or a possible purchaser. The Treasury Regulations cover that. Had Mr. Tavares died on December 23, 1944, by all of the laws and rules of the Treasury Department his estate would have had to pay a tremendous estate tax on the value of that leasehold and option, because it had a value. And yet on the next day, when the government takes possession of it, then government counsel comes in here, knowing, as he must know, the decisions of the Treasury Department, and the courts upholding it, and says that it had no value because of that provision and because it was something that nobody wanted to buy in the open market. Why, I submit if, just like here, counsel for the government was on my side of that proposition and he was representing the government before the Treasury Department, or before this court, or before the Circuit Court of Appeals, [44] where I was making such a foolish contention as that, that no

estate tax could be imposed because of that clause, that you had to get the consent of the lessor and therefore it had no value, or because nobody would want to buy such a shipyard out there at that particular time,—why, he could make a better speech than I could on that subject. Why, as to National City, the law is written into their lease which says it can't be sold, but why didn't he make such a contention and argument with respect to the National City lease and only make it with respect to us? There seems to be some reason or other which I fail to understand. I didn't get into this case early enough to know where or why, but it seems that the only one he wanted to beat in this case was us.

Now, let us see what Mr. Landrum did in his argument on these uncertainties and conjectures and interpretation of contracts before the jury. Page 1172. You know we have a peculiar kind of a fish in the ocean called—well, I have forgotten the name of it, but when it is pursued and is about to be caught it exudes a sort of a substance like ink in the water, which clouds it all up, and then it escapes. This is page 1172—or, I am sorry, but at page 1181 in his argument to the jury he says, and he must have had some purpose in saying it:

“I say to you that, in reading that document, if you can tell me what it means, then you are [45] probably a better man than I am. I tell you that, if the lawyers can agree on what that document means, they are better lawyers than I am. So, therefore, their rights stemming from Plancor 407 are what you are to determine.”

That is not true. Their rights under that lease were for your Honor to determine, and the jury was only interested in the value of those rights, and when counsel makes a plea like that to a jury, telling them that the lease was such that even he could not tell what it means, that no two lawyers would agree on what it means, and, therefore, it wasn't worth anything,—well, he got away with it because I didn't have time enough in the argument, and I don't know that the jury would have believed me if I had tried to point out the correct legal interpretation of the lease. It should not have been left to me, it should not have been left to Mr. Landrum, and, above all things, it should not have been left to the jury to determine what the rights of the Concrete Ship Constructors were under that lease. Nobody else told them. We argued, yes, our rights were this. They argued, no, they were that. The court didn't tell them who was right and who was wrong, and they went out to the jury room in a case which was so complicated, according to counsel's construction, that no two people could agree and he says: You take it out to the jury room and see if you can find out what it means, and if you [46] can't find out what it means and you don't know, and it is speculative and conjectural, and nobody will buy it because it is so confusing, bring in a verdict for zero. And the court doesn't tell them who is right and who is wrong.

Page 1183. Well, I would say that matter concerned that contract and a lot of the jury believed that the government had a right to cancel that contract, believed they did cancel the contract, and believed, therefore, what he says, "Now, if they had a right to cancel the contract and didn't have to pay anything for it, why, certainly it was of no value."

Page 1185, line 24:

"\* \* \* if it was terminated by virtue of that clause (b), if the government requested priority for another branch of the government and Tavares refused to give it, his option never came into being."

And I personally know that some of the jurors thought that.

Page 1189, quoting a case of a willing buyer who comes to him, and he says:

"Why, Mr. Tavares, you can't do that without you get the consent of the Defense Plant Corporation and the Maritime Commission. I wouldn't give you five cents for it."

Trying to sell the jury the idea that because you had to [47] get the consent of somebody on a lease that otherwise would be worth millions, that, therefore, it wasn't worth five cents, knowing, as he must know, that that is not the law when a man dies. Now, the same rule of law ought to apply in fixing the value of a man's property just before his last breath as after his last breath.

The court may at least be thinking: Well, why didn't you except to my instructions? Why didn't you submit correct instructions, or ones you thought should have been given. There are two answers to that, and those two answers will be given by my associate counsel who will now take over.

Mr. Frank L. Martin, Jr.: If the court please, I want to go back and call your Honor's attention to some things that happened here before the close of the trial, and I

refer to page 1073 of the transcript, at the bottom of the page. There the court stated:

"I have not been able yet to determine definitely those instructions which will be given and those which will not be given. I am still working on those. Before the argument and although it is not required strictly, because this is not an action covered by the Rules of Civil Procedure, I propose to tell counsel exactly what the charge will be. But I shall expect counsel to confine themselves to a discussion of the facts [48] and not the law."

After that there was some more testimony, I believe, and there were the arguments. As I recall, it was getting late in the afternoon and Mr. Landrum had to catch a plane that evening, and through inadvertence for some reason that was not carried out. I would like for the record to show that we were not given that opportunity, to go over the charge before the instructions were given to the jury. We didn't know Mr. Landrum was going to argue the points of law to the jury although the court had instructed counsel not to do so.

Immediately after the conclusion of the argument the court gave the instructions to the jury. We didn't know what they were going to be. It was humanly impossible, so far as I would be able to do so anyway, after the court had read the instructions for, as I recall, about forty-five minutes, to get up and state all of the objections to those instructions, that is, to be able to remember them all and to accurately state them. I don't know whether it

would have done any good in the presence of the jury after they had been given and after the argument had been made or not. We were taken by surprise. The only basis we had was to rely on the Code of Civil Procedure of the State of California which states in Section 647, "Matters Deemed Excepted To," and among other things it says, "the giving of an instruction although no objection to such instruction was made; refusing to give an [49] instruction; modifying an instruction requested"; and so forth, are deemed to have been excepted to.

Now, we understood we were going under the Rules of Civil Procedure, and it was my understanding from the statement that I have just read from the transcript. That is my understanding of the law. The Code of Civil Procedure I understand we were going by. This condemnation proceeding was brought under the Second War Powers Act, which is Title 50, Section 630, which along about the middle of it says, "such proceedings to be in accordance with the Act of August 1, 1888 . . . Title 40, Sec. 257, 258)."'

Section 258 of Title 40 is the conformity act, which states:

"The practice, pleadings, forms and modes of proceedings in causes arising under the provisions of Section 257 of this title shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such District Court is held, any rule of the court to the contrary notwithstanding."

Section 257 therein referred to is the section on condemnation of realty, which cites "and other uses."

Also, in the case of Eagle Lake Improvement Co. v. U. S., 141 Fed. (2d), page 562, the court stated: [50]

"If the Federal Rules of Civil Procedure had been applicable to the proceedings below (as the trial court ruled), the motion for a new trial would have been timely made and the appeal, being taken within three months of the denial of the motion, would have been within the time prescribed by statute. However, Section 2 of the General Condemnation Act of 1888, under which these proceedings were instituted, provides that the practice, pleadings, forms, and modes of proceeding in causes arising under the Act shall conform, as near as may be, to that existing at the time in like causes in the courts of record of the State within which the court is held. Except as to appellate practice and procedure, the Federal Rules of Civil Procedure did not affect this statutory mandate."

Now, I would like to go further and cover a few points that Mr. Crouch did not quite cover.

The Court: Before you do that, Mr. Martin, not that it makes any difference on the matter at all, but just to be right on the record,—

Mr. Frank L. Martin, Jr.: Yes, sir.

The Court: —and I apprehend that is what all of you want to be,—

Mr. Frank L. Martin, Jr.: Certainly. [51]

The Court: —it certainly is the desire of the court, commencing after the giving of the instructions on page 1267 of the record, which is the volume for February 27th, after the giving of the instructions the court concluded by directing the jury as to the procedure that was

to be followed in making up the verdict as to form, and so forth.

Mr. Frank L. Martin, Jr.: I can't hear you, your Honor.

The Court: I will raise my voice. Can you hear me now?

Mr. Frank L. Martin, Jr.: Yes, sir.

The Court: After the court had told the jury forms had been prepared for their convenience only, and that they would retire to the jury room and commence their deliberations, on line 3 of page 1267 of the transcript the court stated:

"When you have done so, you will have the verdict signed by one of your number, whom you will appoint to act as foreman, and will then return into court with the signed verdict.

"Are there any exceptions to the charge, gentlemen?

"Mr. Landrum: If the court please, the government respectfully excepts to the court's failure to give plaintiff's requested instruction 1 and plaintiff's requested instruction 1-A.

"The Court: The exception will be noted. Any further exceptions? [52]

"Mr. Monroe: Your Honor please, the defendant, National City, excepts to the failure of the court to give its requested instruction No. 12. That you will recall we have discussed.

"Might I also add this, that we except to the charge relative to the verdict as to the San Francisco Bridge Company, in which, as I recollect, it apparently said, if I quote right, that there was to be

awarded to National City the portion of the value allocated to it, which I believe is not as written in the verdict. I thinks there is perhaps a thing there that might be explained to the jury.

"The Court: I think the instructions sufficiently cover the matter. It might be that we could elaborate a little without in any manner affecting the instructions which have heretofore been given.

"In other words, ladies and gentlemen, the award to the City of National City should be an award to that municipal corporation for the market value of the property taken, and when you have reached that figure, then you will consider the award which should be made to the San Francisco Bridge Company, and the total of the two must not exceed the value which you found to be the value of the interests of the City of National City. Does that clarify it? [53]

"Mr. Monroe: I think perhaps so. Might we also except to the portion of the charge that fixes the date of the valuation as to the Tavares parcels affecting National City? In that connection, your Honor, I simply refer to the arguments that I have heretofore presented to you, for the purpose of preserving those matters.

"The Court: Yes, the record may so show.

"You may swear the officers, Mr. Clerk."

I will not read it all because it just cumulates the record on the litigants. The jury then retired and proceeded to deliberate. Then later on, at 6:10 P. M. they came back for further instructions, and on page 1271 the following appears. I will not read it all, but just the

portion to direct counsel's attention to what the court has in mind:

"The Court: Mr. Foreman, Mr. Roberts, the court has received the following note, which was transmitted, I understand, by you to the bailiff: 'We would like to hear the instructions re Tavares leasehold. A. E. Roberts, Foreman.' You wrote that, did you?

"The Foreman: Yes, sir.

"The Court: File it, Mr. Clerk. If I understand the request, Mr. Roberts, of course, the charge as a whole, ladies and gentlemen, pertained not only [54] to the Tavares interests but to all of the interests. So that the term 'just compensation' and 'market value' and all of those other features, credibility of witnesses and so forth, applies to Tavares as well as all of the others. But I apprehend what was meant was the three or four specific instructions that relate to that interest.

"The Foreman: That is right, sir.

"The Court: I will reread those. The record may show that one of the attorneys, Mr. Frank Martin, is in the court room."

Then the court reread certain of the instructions which appear in the transcript and which you gentlemen have. Then on page 1275 after having done so, the court stated:

"Those are all of the instructions, I believe, on that point. You may retire, ladies and gentlemen."

That is the record in the case.

Mr. Frank L. Martin, Jr.: Yes, that is correct, your Honor. I was there. The point I make is that we relied on law, or the exceptions given to us by law, and it would

have been a physical impossibility for me to have excepted to every error that happened.

The Court: You did not except to any of them, did you, Mr. Martin? I say you did not except to any. You say it would have been a physical impossibility to have related all [55] of them. You did not except to any, did you?

Mr. Frank L. Martin, Jr.: No. I was relying upon the exceptions given to me by law, as set forth in Section 646 and 647 of the Code of Civil Procedure.

The Court: Let me understand that a little more specifically. Is the court to understand that you are stating that you purposely did not take an exception to the instructions which the court had given?

Mr. Frank L. Martin, Jr.: I say it was humanly impossible for me to state all the exceptions that I would have had to state in order to cover all of the exceptions. I couldn't recall every instruction at the time in order to state the exception, and I assumed and understood that we were going under the Code of Civil Procedure of the State of California which says that it is not necessary, that it is deemed excepted to.

The Court: Is that the reason that you did not take any exceptions to the court's instructions?

Mr. Frank L. Martin, Jr.: Those are my two reasons.

The Court: What is the other one?

Mr. Frank L. Martin, Jr.: One of them is that I do not believe I would have been able to do it if I had tried.

The Court: And for that reason you didn't try?

Mr. Frank L. Martin, Jr.: That is right. There is one of the instructions that was given, and I am referring

to my [56] memorandum here, your Honor, to page 1. The court instructed the jury:

"\* \* \* and in this connection if you find that the interest of the Tavares Construction Company and its associates under said instrument of agreement is so speculative and conjectural that no purchaser in the open market would have purchased the same except for a nominal consideration then your verdict as to the interest of the Tavares Construction Company and the Concrete Ship Constructors herein must be in a nominal figure only."

In other words, the instruction there was that the interests of the Tavares Construction Company under the agreement was speculative; not that the elements of value were speculative. In other words, that is a question of law for the jury to determine. Now, how could the Tavares title to this agreement be speculative? If there is something wrong with the title to the agreement, his interest under it might be speculative, or you may devise a tax title to a piece of realty, and if there was a cloud on it, if it wasn't clear, it would be speculative.

Going back again to the Eagle Lake Improvement Company case in 141 Fed. (2d) 562, and, by the way, this was a condemnation proceeding which involved some oil leases and the jury had brought in a verdict that the leasehold was valueless, at page [57] 564 the court says:

"Appellants' principal contention is that the charge of the court erroneously stated the law applicable to the issue of mineral value and was misleading, contradictory and prejudicial. The instructions to which objection was made in substance charged that the jury should find the mineral interests valueless unless

from the evidence it was believed that a reasonable probability existed that oil or gas in paying quantities might be produced. As held in *Olson v. United States*, 292 U. S. 246, . . . elements affecting value that depend upon occurrences which, though possible, are not reasonably probable, should be excluded from consideration as too speculative and conjectural to afford a basis for the judicial ascertainment of value. In Texas, however, a mineral lease is recognized by law as being property having a market value even if it covers undeveloped territory. Where oil interests are involved, a reasonable probability of successful development is sufficient to make leasehold estates of great value; indeed, where there is a reasonable possibility of production in paying quantities, mineral rights are a common subject of barter and sale, and therefore have a definite, ascertainable market value, [58] even where the prospects of successful development are too speculative and remote to be 'reasonably probable.' In any event, such leases have a nominal value.

"The mineral leaseholds here involved are immediately adjacent to a currently productive oil field. Whether or not that field is a domal structure the probable limits of which have been determined by exploration to reach to but not beyond the boundaries of the condemned lands, if the uncertainties are such that the mineral interests in the condemned lands are bought and sold in arms-length transactions for a valuable consideration, they have a market price translatable into a fair market value for condemnation purposes. The charge of the court did not directly state the law applicable to the issue presented, and was prejudicial to the rights of appellants."

Now, there is a further instruction that was given, in which the court said:

"Evidence has been received in this case with relation to the interest of the defendant Tavares Construction Company, Inc. That interest arises out of an instrument which is in evidence as defendants' 'Exhibit W'. That instrument is a lease [59] coupled with an option. In your consideration of that feature of the case you will proceed in the same manner as you proceed as to the market value of the land, the question being what could it have been sold for on the open market for cash on December 23, 1944, the date it was taken or canceled by this proceeding, or shortly thereafter, above what Tavares Construction Company, Inc., would have to have paid under all its terms and conditions."

Now, to me that instruction was misleading. I think I know what your Honor had in mind, that you were attempting to talk about the option, the value of the option, which would be what it could have been sold for over and above what it would have cost to exercise the option. But the instruction goes to the entire leasehold, what this lease could have been sold for over and above what Tavares would have had to have paid under all of its terms and conditions. One of its terms and conditions was that he would have had to pay about, as I recall, some two million dollars if he exercised the option in it, plus the cost of the land, which to me would convey to the jury that he would have had to find a purchaser who had about \$3,000,000, who was willing to pay that for the lease in order to leave \$500,000 for Tavares.

Then the last instruction that was given, which must have stuck in the mind of the jury, is: [60]

"If you find it could not have been sold, then your verdict as to Tavares Construction Company, Inc. will be zero."

Now, all the jury had to do was to look at paragraph 24 of that lease, and in the light of Mr. Landrum's argument, wherein Mr. Landrum read that paragraph to the jury:

"Twenty-Four: Lessee will not without prior written consent of Defense Corporation and the approval of the Maritime Commission sell, assign, or pledge this lease or any of its rights or obligations hereunder, or sublease or permit the use by others of any of the property covered by this lease."

There was no evidence of a consent of the Maritime Commission that they could sell this. Actually, this instruction was to bring in a verdict of zero. I know it was not intended that way, but that is actually what it amounts to. You tell the jury: If you find it could not have been sold, then your verdict will be zero. All they needed to do was to read that one provision of the lease saying that it could not be sold, and Mr. Landrum argued that very point to the jury, where he says:

"Mr. Willing Buyer, I want to sell you this lease. I want to assign it. I want to sublet a part of it to you. What will you give me?"

"Why, Mr. Tavares, you can't do that without [61] you get the consent of the Defense Plant Corporation and the Maritime Commission. I wouldn't give you five cents for it."

That conveyed to the jury the fact that it could not be sold, that there was a legal prohibition against selling it, and where they were told in the very last instruction given them, "If you find it could not have been sold, then your verdict \* \* \* should be zero," then in that case the verdict is zero.

Now, there were a number of statements made by Mr. Landrum in his argument which I believe appealed to the passion and prejudice of the jury. For instance, on page 1180 of the transcript Mr. Landrum said:

"Whatever else may be said, Mr. Tavares is a capable business man. He cut himself in to this wartime Garden of Eden without the expenditure of a penny. He built concrete barges for the government of the United States at a profit, and now he asks you to put your hands into the pockets of the people of the United States and give him a half a million more."

And:

"But, my goodness, are you going to permit those people to go into the Treasury of the United States, when we come in here in a condemnation case, and get any more? [62]

"Well, if you think they are entitled to that, you give it to them. But if you think that it would be right for me to say to you, "I want to get some money out of this war business. I want you to spend \$2,700,000 to build me a shipyard to build concrete ships to sell to you at a profit, and then after it is all through and done, I want you to give me \$80,000 for building my own shipyard, and supervising that, and then on top of that I have taken the expenses, I have taken the vacations for my own office force.' "

Then on page 1190 it is stated:

"What they are actually doing, ladies and gentlemen, is coming into a condemnation case and trying to get damages against the government of the United States for what they claim is a violation of that contract."

Your Honor, I think that is what we are entitled to in this case, the same measure of compensation we would have had if the government had just breached the contract, or they had just said, "We are moving in here. We are kicking you out. We are not going to let you exercise the option. We are rejecting you." They have done the same thing through this condemnation action. I think our measure of recovery should be the same in either case. Certainly "damages" is just compensation. [63] Damages does not mean something that is more than just.

There is one further error to which I wish to call the court's attention, and that is the admission in evidence of Plaintiff's Exhibits 2 and 3. Those two exhibits are correspondence had shortly before the action was filed between the Navy and Tavares, where the Navy indicated they wanted to take this property over for other purposes; not to come in under the priority clause in it and operate this shipyard, but to take it over completely. And there was a letter written back as to certain terms they were willing to settle on. That was an offer of settlement or an offer of compromise of this very action. I believe it was error to permit that to go into evidence.

Mr. Landrum thereafter was permitted to comment on that. On page 1192 he says:

"Ladies and gentlemen, you are not going to give them more than they asked for, are you, before this

law suit was brought? And don't forget, that that was only their asking price then."

The Court: I don't remember the details of those exhibits. Were they offered on cross examination of a witness?

Mr. Landrum: Could I say a word, your Honor?

The Court: If you remember what the situation was, yes.

Mr. Landrum: Yes, and there was no objection.

Mr. Frank L. Martin, Jr.: Oh, yes. [64]

Mr. Landrum: Or no objection to one of them.

The Court: I do not mean whether there was an objection or not, but is the court correct in its recollection that those tokens were proffered on cross examination of a witness?

Mr. Landrum: That is correct, your Honor.

The Court: That was the court's recollection, and I think there is no error in it, if that is the case.

Mr. Frank L. Martin, Jr.: There is also the question that the verdict is against law, and the insufficiency of the evidence to justify the verdict, and inadequate damages. I think Mr. Crouch has pretty well covered that. But here the jury gave one hundred per cent, full pay and credit to the witnesses in their valuation for National City, yet those same witnesses testified for Tavares, and we have a verdict of zero. To me that indicates that the jury followed the instruction that they could not bring in a verdict for anything but zero; that they found that it could not be sold and so the verdict should be zero. I feel they obeyed the court's instruction on that.

The only evidence in support of the valuation in the record is that of plaintiff's witnesses. The defendants' witnesses all go to zero.

The Court: You mean the other way around, don't you?

Mr. Frank L. Martin, Jr.: The other way around, yes, your Honor. The defendants' witnesses are the only ones that [65] show any value, and they range from \$500,000 to \$750,000.

The plaintiff's witnesses all testify to no value, but they all based their opinions on erroneous interpretations of that lease. Mr. Shattuck in his testimony showed very clearly that his opinion was based upon the fact that he understood the government could cancel all Tavares' rights by merely requesting priority. Mr. Mason thought the agreement was too speculative because of the many ifs, ands and possibilities of this and that happening, such as the right to remain on the property and to an option being cut off by condemnation, upon his knowledge of what happened after the last war to another shipyard, realizing that we were out of war at the moment, in other words, basing the appraisal on 1947 conditions and not on 1944 conditions, and that the lease had been canceled by this condemnation action, and that there was no option to purchase.

That is the evidence that we know of that was based on erroneous interpretations of the agreement, and, therefore, I don't believe it constitutes any evidence of value. This verdict of zero is a miscarriage of justice. Certainly that lease was worth something. They were in there, a going concern, carrying on the business, and to just come in and say it has no value at all, well, I don't see how anyone could possibly say that, even if we could not have gotten the option, [66] could not have got a lease, or could say that they were just a tenant in there by sufferance, at will, with no rights except that the government

could have put them out whenever they wanted to, they were in there and were carrying on a business, and it was worth something.

The Court: The court will take a short recess.

Mr. Crouch: Your Honor please, unless you think of some further use that I can be of here, may I be excused?

The Court: Yes, indeed, Mr. Crouch. If you want to go, you may do so.

Mr. Martin: Your Honor please, whatever additional time we have I would like to have in reply to Mr. Landrum. Otherwise, I have no objection.

The Court: Very well.

(A short recess was taken.)

The Court: Proceed.

Mr. Landrum: If your Honor please, I feel that this case was one of the best-tried condemnation cases that I have ever had the honor to be connected with. I also desire to say that it is my very earnest conviction that there is no error and that this motion should be denied. It is my understanding that the defendants in this action had the burden and went forward with the evidence. That is correct. They now come into this court room with a motion for a new trial based, as I understand it, very largely upon the proposition that [67] this lease coupled with an option had no market value, and, therefore, they should have been permitted, although they did not ask this court to permit them to do it, that they should have proven the case differently.

Now, if your Honor please, they themselves took the burden of proof, put witnesses on that witness stand who testified to their opinion of the market value of this lease coupled with an option. In other words, they themselves proceeded to fix the valuation in this case, and that was

the method they used. Now they come in here with a motion for a new trial, and say that that was wrong.

I have also discussed here the question of Judge Yankwich's order. I understood Mr. Crouch to say that Judge Yankwich held that they were entitled to compensation. I haven't read Judge Yankwich's order since I was here in the trial of the action, but it is my recollection of that order that Judge Yankwich said, first, that the interests of the Tavares Construction Company were being taken in this condemnation proceeding and, second, that those interests were compensable. That is his language. So I do not think that Judge Yankwich has ruled that they must receive something.

Now, I also believe it to be the law that counsel, if he has no objection or he is dissatisfied with the court's ruling, I believe it is the law that he should apprise the court of that fact on the trial, and I believe it is the law that if [68] your Honor gave some instruction which they felt was erroneous, I believe that they must apprise your Honor of that situation at the time it arises in order that your Honor may have the benefit of whatever thoughts they may have in that connection. I do not believe that they can come in now and claim error when they took no exception to your Honor's instructions, even though there was error there. Now, as to this question of those instructions, why, if your Honor please, Mr. Martin said that he didn't know and he couldn't take those exceptions. I had copies, and he had copies of some instructions which I think your Honor gave, and that is one that they are taking an exception to now, and I believe they had those copies at least a week before your Honor gave the instructions. So it seems to me as though there isn't a great deal to that situation.

I desire to say to your Honor that I am familiar with all of the cases cited by counsel. As a matter of fact, I tried the Olson case, I tried the Miller case, and I tried the Eagle Lake Improvement Company case. The Eagle Lake Improvement Company case, as counsel has just stated, your Honor, involved oil and gas leases in Corpus Christi in connection with the Corpus Christi Naval Air Base. The case was tried twice. The instruction which your Honor gave with relation to speculation and conjecture was the instruction which Judge Hanney gave in the Eagle Lake case. It was reversed. In the [69] first trial the jury gave them zero for their oil and gas leases. It was not reversed on account of that. It was reversed because Judge Hanney instructed that jury that before they could give them anything for their oil and gas leases they must first find that there was a reasonable possibility that oil and gas could be produced in commercial quantities, and if they did not find there was a reasonable possibility that it could be produced in commercial quantities, the verdict should be zero. The Circuit Court of Appeals reversed by saying instead of using the word "possible" Judge Hanney should have used the word "probable." That is the reason the case was reversed.

We tried it a second time and the second time some of the leasehold interests recovered some money.

It is perfectly apparent to all of us that a market value of a lease is the difference between what it would sell for on the open market less the rent reserved. Now, there are many leases which are worthless, and such a lease is a lease where they would have to pay too much rent.

In so far as the question of the jury being confused is concerned, the instruction that your Honor gave was the one with reference to speculation and conjecture, and that

is the language of the Olson case. The Olson case, as your Honor will recall, was the flowage on Lake of the Woods, and that case was decided by the judges themselves without a jury, and [70] they absolutely refused to give them anything based upon their reservoir values, upon the ground and for the reason that it was too speculative and conjectural. And I believe that any instruction is also proper where a jury is instructed that they must not take into consideration speculative and conjectural values. I believe that has always been the law. I see no error whatsoever in it.

Now, there was one question in this motion which disturbed me a little. As your Honor knows, I did not purchase daily transcript, and I had no transcript. I was a little concerned with their proposition with relation to the date of taking that they had raised, but I find that right in the record we have stipulated that as to the Tavares Construction Company, and that is stipulated in this record, it is December 23, 1944.

Now, in so far as the question that they raise with relation to the date of taking of parcel A, I do not believe they have made any particular argument of that here today, but the Tavares Construction Company is not concerned with that. That is the City of National City, and this jury had to arrive at a conclusion with relation to what would have to be paid for the land as to all of those parcels in order that they might arrive at a valuation of what they would have to pay for that option. So there is nothing to their proposition that the date of taking is confusing. [71]

Now, there is another thing counsel has said, that we seemed to be wanting to give the City of National City some advantage that they didn't have. Now, your Honor

will find that it is stipulated right in this record. The State of California was here, and it is stipulated right in the record that the City of National City had a fee title. That is an entirely different proposition from the Tavares situation. In other words, they say, "Well, the City of National City didn't have any market value. It couldn't sell it." The record shows a stipulation and the statements made by the State of California that they had a fee title. So I find no merit in that contention.

Now, your Honor will recall that throughout the trial of this action I made one particular point. Your Honor will recall that I repeatedly requested your Honor to rule as a matter of law that they were not entitled to anything under that lease and option on account of its being speculative and conjectural. I carried that all the way through the trial. I submitted as a requested instruction where your Honor would take that question as a matter of law, and your Honor didn't do that. Your Honor submitted that question to this jury as a question of fact, and I believe it is entirely proper for this court to say to a jury:

Ladies and gentlemen of the jury, if you find as a fact that this is so speculative and conjectural that it would have [72] no market value, your verdict should be zero.

I am not going to take up a great deal of time in argument of this matter. I have read the record and I find that they pick out certain portions of your Honor's instructions, and that if the whole instruction is taken by its four corners there is no error in it. It is true that they could pick out one little sentence here and there and knock it, and possibly point to it as error, but I certainly feel that under all of your Honor's instructions there is no error.

Now, there is just one other matter that I want to discuss and that is the question of misconduct in my argu-

ment. I feel if I may digress just a moment, that I am about the only one connected with this case that didn't have just exactly a fair deal, because I think that if Mr. Crouch could have his Bible, I should have been permitted to have mine. Outside of that, everything was all right.

Now, I did argue that that instrument was speculative and conjectural. I believe that was right. I believe I had a right to do that. I have tried any number of law suits where the jury's verdicts were zero. The Bridge of the Gods in Washington that Mr. Tavares tells he built, he got that contract and, if your Honor please, I tried that case, and I tried it twice. The verdict was zero in the first trial before Judge Black. In the Eagle Lake case counsel has just read the verdict was zero. If a man has a lease where he pays [73] \$500 a month rent, and it is only worth \$200, the verdict on that lease would be zero. That is a bad lease. I am not going to take up any more time on this matter, if your Honor please. It was a long trial, it was an important trial, and I am sure that the case was fairly and squarely tried.

In so far as this objection with relation to Exhibits 2 and 3 is concerned, there was no objection made to Exhibit 2, but there was an objection to Exhibit 3. I put them in on cross examination as an admission against interest by one of their witnesses. I think it was the gentleman who sits back here, Mr. Seabrook.

So I feel that, under all of the circumstances, they have had a fair trial and the jury has determined this question. We respectfully submit, your Honor, that their motion should be denied.

The Court: There was one question I wanted to ask you, Mr. Landrum, which counsel have not touched on

either, but which is specified in an affidavit, and that is that from your argument, according to the affidavit of John M. Martin in support of the motion for a new trial, the following quotation is made on the second page of that affidavit, commencing with line 6:

"Whatever else may be said, Mr. Tavares is a capable business man. He cut himself into this wartime Garden of Eden without the expenditure [74] of a penny. He built concrete barges for the Government of the United States at a profit, and now he asks you to put your hands into the pockets of the people of the United States and to give him a half a million more."

Was there any evidence that there had been any profit made in this deal?

Mr. Landrum: Some, your Honor.

Mr. John M. Martin: None, in any way.

The Court: I am asking Mr. Landrum that question.

Mr. John M. Martin: Pardon me, your Honor.

The Court: You will have your opportunity.

Mr. Landrum: The evidence in the case, your Honor, was that he was to receive a certain amount of money for each ship which he constructed, and out of that amount there was something like \$341,000 which was to go as rental. There is another letter in here that goes to the question of profit, but it isn't very strong, your Honor. There is sufficient evidence to support that statement but, of course, the question of whether there was profit or not was not the real point in the case. I am frank with your Honor on that. The statement is that he built those ships, that he paid the rental out of the money he got for them. There is evidence in the contracts showing how

much he was to get for each ship. That is all in there. [75]

The Court: But, as I understand you, you said there was no evidence that the Tavares interests had made a profit.

Mr. Landrum: Well, I am not sure about it, your Honor. I wouldn't want to say.

The Court: I have been over the transcript some, but I haven't been over it thoroughly enough to conclude.

Mr. Landrum: Of course, I understand it to be the law, if I may be permitted, that counsel may draw any reasonable inference from the evidence in an argument.

The Court: Of course, an inference must be based on a fact legally proven, or a deduction from a fact that is warranted by the propensities of man.

Mr. Landrum: Yes, I understand.

The Court: That is the danger of it, if there is any danger, with a jury. I do not say that it happened, because I am not prepared now to rule decisively. I am going to read the record a little more thoroughly. I can see how if there were no evidence in the case and if the jury felt, which they would have a right to feel in view of counsel for the government's argument and the manner in which he tried the case, which was thoroughly and forcefully,—they might have said, "Well, the thing is so conjectural that, even assuming there is something to Mr. Crouch's argument," and I am not prepared to say that there is or is not, I doubt it, I think it is rather an ingenious argument, but, nevertheless, it is an [76] argument that appeals somewhat to one's sense of justice, and if the jury in taking up this contract concluded that it was so shot full of uncertainties and difficulties and contingencies that no one could estimate, which is not

really the strict line of a jury's function, because their strict line is to award and assess just compensation, but if they could not even estimate just compensation for the disruption of this contractual arrangement so far as the Tavares interests are concerned, I can see how they might have said, "Well, Tavares made a profit anyhow."

If there is evidence in the record that would have justified that statement, or that inferentially justified the statement, then there could be no complaint made that the jury accepted the statement. But if there isn't, I can see how possibly the twelve persons composing the jury might not be able to agree. Of course, that doesn't mean that they necessarily would have determined the converse of the agreement and found for the Tavares interests.

I will say just one further thing. Then I will hear what further you have to say, gentlemen. That is with reference to Judge Yankwich's ruling. I have read it three or four times and followed it in the case. Otherwise I would not have given the Tavares interests to the jury to decide. If the argument that is advanced by Mr. Crouch is secure legally and logically, the court should have told the jury that the Tavares [77] interest was to be compensated for; not that it was compensable, but that it was to be compensated, and to instruct the jury that they had to find a certain value of that interest. Judge Yankwich, in my judgment, did not say anything of the kind. He wrote an opinion on it, and in addition to that he made findings which are incorporated in the record, which we followed, and we followed them carefully to the letter, because it was a court of coordinate authority, and we always feel that in such matters the trial judges of coordinate authority should not attempt

to review one another's decisions. That would be chaotic and disruptive of orderly judicial proceeding.

Here it is, "Order Upon Pre-trial":

"The court, having considered upon pre-trial the matters heretofore submitted on September 30, 1946, calling for the determination of the nature of the interest of Tavares Construction Company, Inc., involved in this proceeding, does now, after consideration of the record and the joint stipulation filed on September 27, 1946, and the additional memorandum filed on October 4, 1946 and the argument of counsel, determine:

"(1) That the lease and option rights of Tavares Construction Company, Inc. granted under the 'Agreement of Lease,' dated December 27, 1941, and by the supplements thereto, have been taken and condemned by this action.

"(2) That the defendant Tavares Construction [78] Company, Inc. has a compensable interest in the property taken by this proceeding.

"(3) That the facts are as set forth in the joint stipulation and joint memorandum of counsel above referred to and the court's written opinion filed herein on October 10, 1946.

"Dated: This fifth day of February, 1947.

"Leon R. Yankwich, United States District Judge."

Now, in the opinion of Judge Yankwich it is stated as follows:

"The court having considered upon pre-trial the matters heretofore submitted on September 30, 1946, calling for the determination of the nature of the in-

terest of Tavares Construction Company, Inc. involved in this proceeding, does now, after consideration of the record and the joint stipulation filed on September 27, 1946, and the additional memorandum filed on October 4, 1946, and the argument of counsel, determine the said matters as follows:

"The court answers the two questions propounded to it which sum up the findings desired in the following manner :

"“(a) Have the lease and option rights of Tavares Construction Company, granted under the “Agreement of Lease” dated December 27, 1941, and [79] by the supplements thereto, been taken and condemned by this action?”

"The court answers affirmatively.

"“(b) Does the defendant, Tavares Construction Company, have a compensable interest in the property taken by the condemnation proceeding?”

"The court answers affirmatively.

"The court orders specific findings entered in accordance with such answers."

And then the judge elaborates to some extent as to the deciding reasons for his conclusions.

That certainly, in my judgment, did not mean, as I apprehend my good brother Crouch argued, that all the court had to do then was to tell the jury: Now, ladies and gentlemen, you go out, and you haven't any right to say that there is no compensation due, but you go out and you must find that there is some compensation due the Tavares interests. You go out and put that in your verdict.

I do not believe that is the law or that would have been proper. It would have invaded the province of the jury. The law says that the jury shall fix the compensation in these condemnation matters, and for the court to tell the jury where there was simply the legal determination of the right to compensation, as the trier of the facts, that they were to fix that compensation and conclude that it had been proven, would [80] not have been proper. Mr. Crouch argues that there was nothing left to do but to tell the jury that they had to find something. I do not believe they did, and I believe the instructions were proper in which the court stated that if it were only nominal, according to the evidence, that is all there could be found. In any event, I cannot see where there would be any predicate for an award of compensation in an eminent domain proceeding without there being some evidence to show as to how that was to be estimated; in other words, to fix a standard for the fixing of the value of the interests taken, there must be some measure adopted. Even under the broadest interpretation of the Miller case, with which this court is in hearty accord, there must be something definite. Otherwise, it is a pure guess, to bring a jury in and tell them to go out and guess what the Tavares people lost. The pertinency of it is just what I have stated, that if counsel for the government, either in his zeal or because he felt there was some evidence that justified the statement, told the jury when the case was of that peculiar character, that Tavares made a profit, that is a mighty weighty thing to the lay mind. It might not be so to the court, if the court were trying it, because the presumption is that the court does know the law in the case. That is the only phase of the case on which I think I want to review the record a little more thoroughly.

Mr. Landrum: In that connection, could I call the court's [81] attention that there was no objection made in the record and there was no exception taken in the record?

The Court: That is true, but I am not speaking of that aspect of it. I will not say any more about that.

Mr. John M. Martin: If the court please, at page 2 of the memorandum of the points and authorities, or, rather, page 2 of the affidavit which I made, I also quote from the record the following statement which Mr. Landrum made in his argument, as shown by page 1180 of the transcript:

"Whatever else may be said, Mr. Tavares is a capable business man. He cut himself into this wartime Garden of Eden without the expenditure of a penny."

Now, not only is there no evidence in the record to that effect, but none was offered, none would have been admissible, and it is so far from the truth that I can't help but comment on it. Here is a jury that have gone through the war the same as the rest of us.

To say that a man has cut himself in on a wartime project, a wartime Garden of Eden without the expenditure of a penny, without a scintilla of evidence in the case to show it, none offered and none would have been admissible, it seems to me was a serious and prejudicial statement against the rights of my client.

Now, passing back for the moment to the order which Judge [82] Yankwich made, perhaps I get a little different impression from that order because Mr. McPherson and I spent all day long arguing before Judge Yankwich, and the gist of the argument there was that the govern-

ment was contending, first, that the interest was not compensable in this suit, and, second, raising the question as to whether it had actually been taken; meaning, first, as to whether they were condemning any option rights, and then, next, as to whether I wasn't relegated to a suit in the Court of Claims on a contract of frustration, in not having been able to carry that option out. That was an extended argument, and what I wanted to know and what the government wanted to know was whether we were going to determine in this suit all of my rights to compensation, or whether we were going to try to take two bites of the cherry, and have the court here determine only the leasehold interest exclusive of the option and that the contractual provision to purchase under the option was something the government was not condemning and something the enforcement of which would have to be carried on in another forum, the Court of Claims. So when I came into this case I understood from the pre-trial ruling of Judge Yankwich that not only the leasehold estate as such was compensable in this action, but that the expert witnesses would be privileged to take into consideration the added value, if any, which the option feature gave to that leasehold interest. [83]

Apparently the court was not of that opinion, and I direct your Honor's attention to page 433 of the transcript, line 20, one short paragraph, where the court in speaking says:

“When it comes to the question of value of the option it seems to me that the case can be simplified by the optionee preserving in the Court of Claims anything subsequent to the date of the termination of the project.”

Now, what your Honor had in mind by "termination of the project," and maybe I didn't understand you, but I understood by "termination of the project" you meant the date of the declaration of taking as to our claim, the date on which the government filed the declaration of taking, December 23, 1944, and terminated all of our rights or acquired them or kept them from coming into being, it doesn't make any difference how you classify it. It was my understanding, in view of Judge Yankwich's ruling that whatever added value that option had, that we could show by the witnesses, the expert witnesses in their appraisals, that they had given consideration to it and that the value of the option under well-established legal principles was the difference between the option price of the shipyard and what the shipyard could have been sold for, and that were I suing in the United States Court of Claims based upon this option contract for just compensation, [84] that that is the rule and yardstick for compensation which the Court of Claims would follow, the difference between the option price of the shipyard and what the shipyard could be sold for.

So I had intended in showing my values to the jury to prove or to have my witnesses testify that they had taken into consideration the option value, and that that was an enforceable right and that it was a valuable right. I wanted to show that the government by its declaration of taking on December 23, 1944, under the ruling of Judge Yankwich, acquired that option right. Now, I don't care whether you say the option had come into being or whether we had to have a 10-day notice. If it had not come into being, at least Tavares had a right to have it come into being, and for the frustration of that right and the prevention of that right he was entitled to compensation.

Except for this condemnation suit he could have sued in the United States Court of Claims, and he would have filed his action in the Court of Claims upon that option right. Or if we want to say it came into being and that it was in existence all the time, but was breached by the declaration of taking, I care not, even if it was breached we were entitled to have brought an action and to have sued in the Court of Claims and the court there would have applied the yardstick as to just value, just compensation, to-wit, the difference between the option price [85] of the shipyard, and what the shipyard could have been sold for.

The Court very properly instructed the jury that in weighing the expert testimony the opinion and conclusion expressed by the witness was no stronger than the reasons or grounds which he assigned to it. I wanted to show by evidence that my witnesses had taken into consideration and assigned as one of the grounds for the opinion of that expert as to value the fact that they knew there was a personal right of action in Tavares, as assignee, for the enforcement of that option or for the recovery of just compensation in the Court of Claims, and yet as the record shows at length, at the insistence of government counsel I was told I could not even talk about the Court of Claims and that I could not cross-examine and say:

“Had you taken into consideration, Mr. Mason, the fact that Mr. Tavares had the right to sue in the United States Court of Claims and recover the damages between the option price of the shipyard and what it could be sold for?”

I could not, in fairness to the ruling of the court, ask any kind of a question like that, and refrained from so

doing. Nor could I ask any of the experts whether they had, in arriving at their opinion as to value, taken into consideration as to this lease and option contract, that he had a right to enforce that option or to recover compensation for its breach, [86] or, if you please, to recover compensation because the government by its declaration of taking prevented it from ripening into an existing option which he could exercise.

Now, I am in the situation where I gather, from what the court said from time to time during the record, that the court felt that my value of the option was a matter to be presented to a subsequent forum, a different forum. I gather that from this statement, again at page 433, where the court says:

“When it comes to the question of value of the option, it seems to me that the case can be simplified by the optionee preserving in the Court of Claims anything subsequent to the date of the termination of the project.”

Now, as a matter of fact, if the court had the right in this case so to do, I would make no objection. The trouble is that with Judge Yankwich’s ruling on pre-trial that my interest is being taken, all of it, and it is compensable herein, I do not see how any court here, except an Appellate Court that would reverse Judge Yankwich’s ruling, could preserve to me an action in the United States Court of Claims, to file an action for damages.

I am confronted with the situation that as long as Judge Yankwich’s order on pre-trial stands I have to prove all my rights in this court, they are all here, and the judgment [87] becomes res judicata as to all of them,—if I understand what the court has ruled, or intended to rule

in this case. And yet there was submitted to the jury the determination of the value of that option without their being permitted to hear in the argument by me, or in testimony by a witness, or from the court, or any other source, and they never even became aware of the fact that Tavares, as of the date of the declaration of taking, would have, except for the filing of this condemnation suit, a chose in action against the United States Government, which he had an absolute right to prosecute in the United States Court of Claims, the only court in which the government has consented to be sued, for an amount here involved, and that he was being deprived of that right under Judge Yankwich's ruling, because by this very declaration of taking the government acquired that right. I don't care whether it had come into being, into existence as an option, or whether it was a breach of it after it came into being. In any event, it was a contractual right.

Now, all of these decisions here, and I have searched them and have tried to find an exact case, and admittedly we can't, but they all boil down to where the courts have said repeatedly as to the value of property in these condemnation cases it is proper for the court or for the jury to take into consideration all of the uses to which the property can be put. [88]

Now, what are they condemning here? They are condemning a certain contractual right. When they condemn our Exhibit W, our lease and option contract, the most valuable use to which that contract could be put would be to found upon it an action in the United States Court of Claims for the recovery of compensation or damages as between the option price of this shipyard and what the shipyard could be sold for. And yet, as the record stands in this case, this judgment is res judicata of every right

that my client has and will continue to have just so long as Judge Yankwich's ruling stands.

The Court: May I interrupt you a moment, Mr. Martin?

Mr. John M. Martin: Certainly.

The Court: I recall that during the case, and maybe that comes from a reading of the transcript, there was a discussion at the bench with respect to a certain line of questions that were being propounded, I think by yourself, and the court and counsel, in the presence of the reporter, had quite a discussion concerning the reservation of rights before the Court of Claims. Is my recollection correct?

Mr. John M. Martin: Yes. Your Honor was proceeding on the theory that we could preserve and protect those rights, and that we could draw a line of demarcation, but I didn't feel I could and that I should make my offer of proof. I will read what I said at that time. Nevertheless, I felt in obedience to your Honor's instructions,—Mr. Landrum objected to my talking about [89] the Court of Claims, and your Honor said I would not be permitted to. I want to just read page 401 of the transcript.

The Court: Let me get that.

Mr. Martin: It is rather lengthy, but if you will start at about line 5 of page 401, or, go back and start at page 400, line 20. At that time I had in mind the admissibility of proof as to the consideration with which we had parted in this case by the condemnation of the lease and option contract. So if you will begin at line 20 of page 400 of the transcript where it states,—or, do you have the page before you there, your Honor?

The Court: Yes.

Mr. Martin: Thank you.

The Court: On page 403, Mr. Martin, and I am asking this because I have no independent recollection, commencing with line 13, after the discussion ensued about the reservation of a claim or suit in the Court of Claims, or if you will go back to line 9:

"Mr. John M. Martin: Plus the fact as to what the jury had to do with that. If I am strictly limited to the normal rule of eminent domain, then I am limited to the fair market value of my leasehold estate.

"The Court: We will cross that bridge when we come to it. I haven't had from any of you yet your requested instructions, and I want them when we recess tomorrow night, at least."

Did you hand up any requested instructions on that point?

Mr. John M. Martin: No.

The Court: I don't remember [90]

Mr. John M. Martin: The only request I made, if the court please, was based on the theory on which I was permitted to offer evidence, and that was market value. That is the only evidence I was permitted to offer. If you will carry forward in the transcript there, there is a bit that is not material, but starting at, for instance, line 18, page 403:

"The Court: What I want to know is whether you gentlemen are together on the factual presentation of what you want to present to the jury.

"Mr. Landrum: No, your Honor. We seem very far apart. I can't get counsel's theory. If it is that he is entitled to claim some compensation from the government of the United States in a condemnation case for the reason it took away from his right in the Court of Claims—

"The Court: There are, of course, certain rights terminated by eminent domain proceedings. Sometimes those rights are such as, in the absence of the sovereign power, would not be considered just.

"Mr. Landrum: He certainly is not going to try a case before the Court of Claims and this jury, too.

"Mr. John M. Martin: I am of the opinion that you have raised the jurisdiction again on me. If [91] the court can accord me the same right as in the Court of Claims— .

"The Court: You need not have any fear but what the court, in so far as it can, will permit the jury to find just compensation for the taking which the government has accomplished.

"Mr. John M. Martin: Then I don't need a requested instruction.

"Mr. Landrum: I will say this, and I say it advisedly, that there are a good many more instruments of this kind. There are a lot of instruments that were signed up long after this case was brought. If counsel is going to be permitted, and I know he is not, to go and talk about the right to sue in the Court of Claims—

"The Court: No; he wouldn't be permitted to discuss that. The court has stated that, as a matter of law, without indicating anything further at this time, the case will be submitted to the jury upon the theory that the jury shall fix just compensation for the taking that has been accomplished by the government at the time applicable to the case."

Now, I understood there that in proper conduct of Tavares' testimony the only thing I could do, in living up to the letter of your Honor's ruling was to refrain from

discussing [92] Court of Claims before the jury, and to refrain from cross examination of witnesses as to whether they were aware of the existence of the right to sue in the Court of Claims to recover just compensation. And I felt I had no right to come back with Mr. Tavares on the stand at the time and ask him: Now, Mr. Tavares, did you in arriving at the opinion stated as to value take into consideration the fact that you had a personal and unassignable right in the Court of Claims, the only court in which the government under the Act of Congress had consented to be sued, to file a suit for the enforcement of your rights under the option, and that except for the requirement to prove your compensation here, you could maintain your right for an independent action? Now, just what would have been a proper way to get that before the jury is not disclosed by the record in the form of affirmative proof. But I assure your Honor the reason I did not make that offer of proof is because I felt it would be contrary to your Honor's ruling.

On the other hand, I had come into the case prepared to try the case; in view of Judge Yankwich's ruling, on the theory that our entire interest was being taken, including the option, and that our entire interest was here compensable, including our option, and that is the way I planned to try the case, so that when we were through we would have adjudicated every right we had. But now I am fearful, in view of Judge [93] Yankwich's ruling, that I have adjudicated every right and that I have done so at a time when your Honor really felt as stated here on page 433 of the record:

"When it comes to the question of value of the option, it seems to me that the case can be simplified

by the optionee preserving in the Court of Claims anything subsequent to the date of the termination of the project."

Now, it just seems to me that I was put in a situation there where, in obedience to Judge Yankwich's ruling, I had to put in my evidence and be forever bound in this suit, and where in obedience to your Honor's ruling I was told I should not do so, and I didn't do so. And I have said in my affidavit that I was taken by surprise.

I think had the jury known that, in addition to the value of the leasehold interest that a proper measure of the value of this option was its actual value, that you could not barter or sell it, but that its actual value was whatever you could collect upon it in an action in the United States Court of Claims. And what would be the rule in force in suing in the United States Court of Claims? Why, the difference between the market value of that shipyard and the option price of the shipyard. That would have furnished the added value of the option which the expert witnesses, under Judge Yankwich's ruling were entitled to take into consideration [94] When they testified as to their value of the entire leasehold and option estate then being taken.

Now, perhaps I was derelict in what I was trying to accomplish, but I certainly have been caught between one order of Judge Yankwich, which requires me to put in my proof and be forever bound by it, and your Honor's ruling, under which I was restrained from putting in the proof. The result is that the case has never been tried on its merits. The possessory rights may have gone in on the issue of market value, but the option rights of my client did not. True, they could not be sold, but that

would not make any difference in the United States Court of Claims, and the government would not be presumed to be bound by the market value, but they would weigh whatever damage you can prove you sustained, whether you could sell it for a nickel or for \$1,000,000. The proof would be the difference between the market value of the shipyard and the option price of the shipyard. That would have been the full measure of the just compensation for the value of our option, for the failure of the government to perform, or for what you might call contract frustration. I am not referring here to contract frustration in the sense as stated by Justice Butler, because there they were dealing with contracts where there was no privity of contract with the government. For instance, in World War I, where they would say the government would contract to take your entire output, and the government would requisition or take the [95] entire output of the factory, and I say I am tremendously damaged, but I have no privity of contract with the government. There the cases they have referred to as frustration of contract are a frustration of a third person. But in a case of this kind, where the contract is directly with the government and there is a direct privity of contract, whatever damage we have was an absolutely enforceable obligation until such time as we were discharged from that contract, and that was at the declaration of taking in the instant case. It seems to me that we have not been compensated. If that can be accomplished here, then the government has a defense to every suit now pending in the Court of Claims or that can hereafter be filed, and all they have to do is to condemn the basic contract, which is non-assignable by its terms, and instruct the jury that it can't be sold and that the verdict should be zero.

I do not believe for one minute that the Tavares Construction Company have had a chance to have their option rights determined on their merits by the evidence here adduced. I don't think sufficient testimony was permitted to go before the jury to even make the jury aware of the existence of such a right, inherent in the option contract, that Tavares could sue in his name and enforce it regardless of whether it could be sold or not, where you could not barter and sell a contract with a government, but where it has a [96] value, and I think the jury, in fairness and to prevent a miscarriage of justice, should have been informed as to that right.

As to stating the exceptions, I must confess that I have read a lot of law on the question as to how they intend and contemplate making applicable the Federal Rules of Civil Procedure, under our new rules in these condemnation cases, in the face of the Second War Powers Act, where they go back and adopt the old statutory procedure. But from everything I can learn and everything I knew on that subject at the time I was trying this case, it was my opinion that I had the alternative of either stating my exceptions and being bound by those that I could remember and state, or of not stating them and letting the law of the State of California preserve them unto me. It is my opinion that had I attempted to state any exceptions to the charge at the end of the charge to the jury that I would be bound by the enumeration of those which I stated, and as to any I couldn't remember it would be just too bad. I couldn't remember them all. I didn't feel I could intelligently state them. It was my understanding under the California law that my exception was saved, and that I could either state them or need not do it, and inasmuch as I could not do it intelligently from

recollection, I assumed that my rights were protected under the statutory provisions of Section 646 and 647 of the California Code of Civil [97] procedure. Since then I have briefed that question, and I think that is true. I do not think it makes it very difficult on the court, but it seems to me that when Congress added to our judicial provisions there that last sentence, that notwithstanding any rule of the court to the contrary, under our Federal Rules as adopted or by any supplementary rules that the local court might add thereto, that is the situation, and at the present time I still recognize confusion in how I am to make a record that protects the interests of my client. For instance, as to the entry of the judgment here, under the Federal Rules I should approve it as to form, if I have no objection as to the form. In trying to meet both the requirements of the California Code of Civil Procedure and the Federal Rules, I felt that the advisable thing was to be there on time and to state whatever objection I had.

I do feel there has been a miscarriage of justice here, and in order for a jury or a court without a jury to properly evaluate and compensate in a just manner Tavares for the taking of the option rights, that the court would have to have in mind the yardstick by which the Court of Claims, for instance, would compensate Tavares in the event the right to compensation was being there adjudicated, instead of, in obedience to Judge Yankwich's ruling, being here adjudicated. I am not to blame for that dilemma for the reason that the [98] United States Government, who wanted this shipyard, had a right to condemn the land or the leasehold estate or the interest in the land, and they had a right to condemn personal property. But I do say that they have not shown any public

necessity, and I know of the existence of no right through eminent domain to condemn a chose in action held by Tavares as to personal property. There is about \$2,000,-000 worth of personal property here. Yes, they could condemn the personal property, and take the leasehold and condemn the option rights in the land, but I know of no public necessity and know of no right under eminent domain for the purpose of condemning a chose in action against the United States Government as to personal property, where that is a chose in action which the government itself has granted. That contractual right was granted by the United States Government to my client twenty-four hours after this suit was filed. I don't know what will happen in this case, any more than court or counsel, but suppose, for instance, some court some day holds that there was no public necessity for condemning the right of action, the chose in action which my client possessed against the United States Government as to the personal property. Suppose, for instance, that the court some day holds and reverses Judge Yankwich and says that the interest of Tavares, in so far as his option is concerned, has not been taken and condemned in this case, and that I have [99] and possess, by virtue of that fact, all the option rights that Tavares originally had, right up to January 1, 1950, but that the government having, as the evidence here shows, dismantled the property, removed it and changed it, has not performed that agreement, it would be a useless act for me to get performance. You will find a stipulation of record in the case that the government waived a 10-day notice, and it did not go before the jury because it was past the deadline of December 23, 1944, but you will find there in the stipulation an answer from Tavares asking the government to calculate the contract

price at which it might elect to ascertain what compensation it would give for the removal of the property, or what additional allowance they intended to make for the improvements they put on of \$1,000,000 or \$1,500,000. That letter was never answered. The whole correspondence is in the file. That was not material to this jury, but when you come down to the fact that some day some court may hold that while all of our right and title and interest in and to the land and to the interests in the land was taken, that as to our chose in action, our action rights in this personal property, that there was no public necessity, and it was not taken. They may hold that only our leasehold estate and property rights were taken, but that our contract frustration rights still remain. If they do, it seems to me that the acquisition cost, as determined in this action, is the con-[100] tract measure, which my client agreed with the United States Government twenty-four hours after this suit was filed would become the option price upon this site. And I am vitally interested in seeing that option price, that acquisition cost, is fairly determined, and at a proper time I shall demand in writing in this case that the United States Government present, for the use and benefit of the Tavares Construction Company, a motion for a new trial in this case.

I do not propose to have my client bound by an acquisition cost which is reached by stipulation or other than by condemnation decree, where I feel the judgment is exorbitant.

We are in a situation here where the same jury upon the testimony of the same witnesses goes clear to one extreme in the rendering of a judgment, a verdict against the government as to one set of defendants, for even more than, or, not only more than the government witnesses testified to, but even more than some of the claimants' witnesses testified to, and at the same time the same jury, upon testimony from the same witnesses, rendered a verdict against my client in favor of the government for zero.

We are in the anomalous situation, if the court please, where the sole issue is just compensation and of the government coming in and trying to negotiate and get our from under, and where the verdict has been carried by that jury to the very extreme on the one hand and against the government, and [101] trying to take advantage of everything the government gained by that same jury, on the testimony of the same witness, and going to the other extreme and bringing in a verdict against my client for zero.

If the court please, I do not believe that is just compensation. I do not believe that this court or any other court will ever so hold. I do not believe I have had a chance to present, fully present the issues of fact and prove value on all the issues of this case.

I am sorry I can't point to a particular case in point. I can assure you there are none. I have tried to find one. The fact that the issues are novel is not my fault.

Thank you.

The Court: I want to ask one further question about the record, Mr. Martin, or any of you, as to a matter that

I am not familiar with. Was there at any time any application made for the severance of the trial on the Tavares interests?

Mr. John M. Martin: No: There was some discussion back and forth, and, as a matter of fact, the last discussion was I think the day before the trial here I suggested to Mr. Landrum that, if he wanted to, I would stipulate that we go ahead and try the case and get it over with, but so far as the Tavares interests were concerned, I would stipulate that the court could decide the award to Tavares. I knew the legal principles in issue and I didn't think it would be proper [102] to go to the jury. But the case was delayed, it had been filed several years ago, and we felt it should be determined. But, so far as I am concerned, that offer is still open to the government. I will still stipulate now, if the government wants to make it, that I will submit this case to your Honor on the record without a jury.

The Court: I was not asking for that purpose.

Mr. John M. Martin: That is true.

The Court: But I was asking it for the pertinency the question has to the argument. Have you finished?

Mr. John M. Martin: I have finished, your Honor.

The Landrum: I have nothing further, your Honor.

The Court: I wanted to say this on that phase of it, that is was a complicated situation. I have presided in the trial of many condemnation suits, and all other types of suits for thirty-six years, both on the State and Fed-

eral benches, and both on the trial and on the appellate tribunals, and I have never encountered a condemnation case, with a jury I mean, which was as complicated as this case was. That is the reason that I asked whether there had ever been any request made for a severance if the jury were to be called. Of course, no complaint could be made about the litigants calling for a jury. The Constitution says they may have a jury to fix their just compensation, so that no one has a right to complain about a jury being called in an eminent domain case. I am not [103] stating it for that reason. There was a jury called, and it rendered its verdict here.

Mr. John M. Martin: Would the court like for me to state the reason that I did not feel severance was proper? It was only this, that there was pending in the State Court by one of the defendants in this suit, National City, a suit against Tavares for rents, and I had my counter-claims in this action set up, and with the pendency of this suit and seeing this court would first acquire jurisdiction of the parties and the right on the date of the declaration of taking that this matter should be here litigated, I did not see how I could agree to a severance and at the same time participate in the trial of a suit where National City was putting in its evidence as to that right.

The Court: I will have to read the record before ruling. You have made the motion, and it is submitted.

[Endorsed]: Filed Jul. 29, 1947. Edmund L. Smith,  
Clerk. [104]

[Title of District Court and Cause]

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
ON HEARING OF MOTION TO CORRECT  
AND MODIFY RECORD AND JUDGMENT [1]

Los Angeles, California, Tuesday, December 2, 1947.

11:00 A. M.

The Clerk: No. 248—Southern Division, Civil. United States of America v. Certain Parcels of Land in the City of National City, et al. Motion of defendants Tavares Construction Company, Inc., et al., to correct and modify record and judgment.

Attorney Landrum for the Government and Attorneys Martin for the defendants.

The Court: Proceed, gentlemen.

Mr. John M. Martin: If the Court please, this is a motion I filed to modify and correct the record and judgment in this case. I filed a supporting affidavit and I will not repeat the statements in that affidavit, but somewhat explain what prompted me to file this motion.

After a careful examination of the record in connection with the settlement of the record on appeal, I personally was convinced, in such examination of the record, that it must have been the view of the trial court that the court was without power in this proceeding to determine the question of compensation for the taking or cancellation or frustration of the option contract held by my client.

I have tried to meet what is rather a difficult problem, that is, to set forth in my affidavit what I conceived to be in the mind of the court, from the impressions gained during [2] the trial and reading the transcript, but it did

appear to me that in the view of the trial court there was but one possible exception that the court had in mind in the conclusion it had reached as to lack of power to determine the question of compensation as to the option feature.

That exception was perhaps the jury could, by a direct finding, tell the court whether in the jury's opinion this option could be sold upon the open market and by reason thereof had a market value.

As I see it, the verdict in this case was really a directed verdict. The jury was directed or instructed that in the event they found that the option contract could not be sold, their verdict was to be for zero. After retiring for consideration of the case, they returned with the request that final instruction be again read to the jury, and the jury went out and promptly brought in an answer of zero. To me that was a very definite instruction to the jury, that if they found the option could not be sold—only on the open market—they were directed to so indicate their conclusion by the word "Zero" in the place for the verdict.

I think, had the court asked them to expressly make a special finding as to whether it could be sold, their answer would have been "No," the same as they put in their answer "Zero." If that is true, and by that I mean if my conclusion of the view of the trial court is correct, then the court, [3] instead of proceeding to determine just compensation or attempting to fix an amount of just compensation for the taking or cancellation of this option, should by its record and judgment simply have determined that, in view of the special finding of the jury, the court was without power in this proceeding to determine the question of just compensation.

If the judgment so provided, it would, as I see it, more nearly conform to the views of the trial court as I gained them from the record and from the trial. As it now stands, I have attempted in an affidavit I filed to point out the portions of the record from which I have drawn the conclusion or reached the opinion that I have just expressed. I will not at this time read that affidavit unless the Court desires to have me do so.

The Court: I have read it, Mr. Martin.

Mr. John M. Martin: Thank you.

The Court: Mr. Landrum, what have you to say about the matter?

Mr. Landrum: If your Honor please, may I in the beginning express my happiness to be in your court again. But I do feel, if the Court please, that it is about time there should be an end to this matter.

As I understand the motion and the moving affidavit, it amounts to nothing more nor less than a motion to amend a final judgment of this Court. I am, of course, not thoroughly [4] familiar or my recollection isn't just as clear possibly as it should be, in that we tried this case almost a year ago. I do know, however, that this record shows that by agreement there was submitted to Judge Yankwich two questions. I do recall very distinctly that at the beginning of the trial of this action your Honor stated that you considered yourself bound by Judge Yankwich's order.

In October, 1946, Judge Yankwich held, first, that the rights and interests of the Tavares Construction Company had been taken and condemned in this action.

Second, that the Tavares Construction Company had a compensable interest.

Now, when we started the trial of this case at San Diego, I recall very distinctly, although I do not know that the record shows it, that your Honor said that you were bound by Judge Yankwich's order. Of course, if your Honor please, I personally could see no reason for the presentation of that matter to Judge Yankwich, because it has always been my opinion, by virtue of the declaration of taking of December 23, 1944, the Government took all the rights and interest of the Tavares Construction Company. So I say that this question has already been passed upon by Judge Yankwich. It is part of the record here.

Then, if your Honor please, in addition to that, we came before your Honor on a motion for a new trial. That I believe [5] was on the 6th day of June, 1947. If your Honor will take the record that was made on that motion for a new trial, you will find that almost the same thing that he now presents was presented by Mr. Martin to your Honor at that time. And your Honor will recall, I am sure, the argument which Mr. Crouch made, wherein he undertook to say to your Honor that Judge Yankwich had said there must be compensation paid. Your Honor went into that at length in the record.

Of course, your Honor explained to Mr. Crouch that Judge Yankwich did not hold that that jury must necessarily return a verdict for some amount. The record is perfectly clear on that.

So, as I say, the matter was presented to your Honor on that motion for a new trial. That is the second time. Now we are here again.

If your Honor please, when I was assigned to try this case I came here. I was told that there had been some sort of an agreement or an understanding between repre-

sentatives of the Government of the United States and Mr. Martin wherein and whereby, if Judge Yankwich held that the rights of the Tavares Construction Company had been taken in this proceeding, that we would try it wholly and without raising the question of the jurisdiction of this Court in a condemnation proceeding to determine compensation for the taking of these facilities and personal property. [6]

Mr. Martin stated to me he had that agreement with Mr. Littrell, and if your Honor believes that, I carried it out.

Regardless of the handicap to which the Government might have been put in the trial of this action, I undertook to carry out what Mr. Martin said was the agreement.

Now I feel this way, if the Court please: There defendants assumed the burden of proof in this action. These defendants laid the pattern under which just compensation was determined in this case. These defendants placed upon that witness stand as their first witness Mr. Tavares. They followed him by Mr. Hotchkiss and they followed him by Mr. Anewalt, and to each and every one of those witnesses was propounded the hypothetical question, "What, in your opinion, was the fair market value of all the rights and interests of the Tavares Construction Company under and by virtue of Plancor 407, Exhibit W?" They laid that pattern.

They were the ones that determined that the question which that jury was to determine was the fair market value of the interest which Tavares acquired under and by virtue of that exhibit. I say to your Honor that this question has been answered, and it has been answered by this jury.

First, I want to say to your Honor that we have here nothing more nor less than a rehash of the matters which were presented to Judge Yankwich.

Second, that we have here nothing more nor less than a [7] rehash of the matters which were presented to your Honor at San Diego on the 6th day of June, 1947.

I also want to say to your Honor that this motion asks your Honor to determine the question of the jurisdiction of the Court of Claims, should this matter be presented to it. They come here and ask your Honor to say that they have left a matter which they can present to the Court of Claims. With all due respect to this Court, I very earnestly submit that it is beyond your Honor's power to determine whether or not the Court of Claims would have jurisdiction. And I say to your Honor that if they have, they have.

If this judgment stands as it is, if they proceed in the Court of Claims, it will be up to the Court of Claims to determine what the question of their jurisdiction is. And then I say this judgment has been appealed from.

This is an action in eminent domain, an action in condemnation, and I very earnestly submit to your Honor that this Court has no jurisdiction. This judgment has not only been appealed from, but the term in which it was entered expired on June 30, 1947. I believe it to be the law that where a judgment has been appealed from, the District Court has no jurisdiction to modify, vacate, or amend its judgment. And in support of that contention I respectfully cite to your Honor Miller v. The United States at 114 Fed. (2d) 267.

Now, this judgment was entered on June 6, 1947. The term [8] of court at which it was entered expired June

30, 1947. The authority of this Court with respect to this judgment ended with the end of that term.

I respectfully cite to your Honor United States v. 534.7 Acres, 157 Fed. (2d) at 828. That case was decided in 1946; 157 Fed. (2d) at 828.

I also cite United States v. Smith, 331 U. S. at 469.

In the Miller case the Court stated very plainly:

"The District Court has no authority to vacate a judgment by it entered in an action at law after an appeal from said judgment has been taken."

Your Honor knows, and the record will show, that this case has been appealed.

Now, if your Honor please, along the lines of what I did when I tried this case, I have reduced this question of law to writing. I have a memorandum, if I might be permitted to hand it to your Honor, and I will hand counsel a copy of it.

Now, there is just one more word which I desire to say to your Honor, that counsel appears to rely upon paragraph 14 of page 14 of this judgment, wherein it is recited that this Court retain jurisdiction of this matter for the purpose of making any further orders, decrees, or judgments herein. I take it that he must rely upon that paragraph of this judgment as his authority against the decisions of the courts which I have cited to you. [9]

If your Honor please, this is a final judgment, and I am sure we all know that that paragraph is inserted in judgments in condemnation in order that the Court may make any further orders or decrees to carry out that judgment. It does not mean and it was not intended to mean that this judgment itself could be changed and amended. The new Rules of Civil Procedure do not

apply to condemnation cases, and that paragraph 14 of page 14 of this judgment does not give this Court authority to change and amend a final judgment which has already been appealed from.

I respectfully submit to your Honor that this case was fairly tried. They themselves assumed the burden and submitted to this jury the question of what was the just compensation for the taking of all the rights and interest which Tavares Construction had, by virtue of Exhibit W. That jury answered that just compensation was zero.

I respectfully cite to your Honor in that connection your Honor's own statement in this record to Mr. Crouch when Mr. Crouch argued that Judge Yankwich had held they must receive some compensation.

We have submitted this matter, and in all justice and in all fairness we very respectfully suggest there should be an end to this matter.

The Court: Before you answer, Mr. Martin, I want to call attention to what I think is a mistake in the record. I think [10] it would happen because of the phonetics that would be involved in the matter.

On page 435 of the transcript, being transcript of Thursday, February 20, 1947, the word "structure" appears on line 3. I think that word was "frustration."

Mr. Landrum: Yes, your Honor.

Mr. John M. Martin: That is true.

The Court: The reporter's transcript reads thus:

"I am not saying that there may not arise in some other forum a claim for structure breaches, and so forth, for damages of that kind."

I think that word "structure"—

Mr. Landrum: What page is that, your honor?

The Court: It is on page 435 of the record.

Mr. Landrum: If your Honor please, could I say just one further word?

The Court: That should be corrected in the transcript before it goes to the Court of Appeals.

Mr. Landrum: Your Honor understands there was an agreement between the Maritime Commission and the Tavares Construction Company on August 9, 1946, with relation to their re-negotiation and their further rights under this contract. That was not in evidence.

The Court: I didn't know that judicially. I have heard since, that happened. There was no way that the Court could be [11] apprised of that.

Mr. Landrum: No. It isn't in evidence, your Honor.

The Court: I understand later on there was something about that.

Mr. Martin, do you have anything to say?

Mr. John M. Martin: If the Court please, counsel in his memorandum states on page 2 that paragraph 14, page 14, of the judgment here in question is the usual paragraph inserted in judgments in condemnation proceedings, "under and by virtue of which the Court makes orders and decrees with relation to the disbursement of funds."

The provisions of our judgment are not so limited. They are general; they are broad. They retain jurisdiction of this Court for the purpose of making any order, and I assume that order would be any order necessary to carry out the true intent of the Court.

If through inadvertence or otherwise this Court has signed a judgment that does not carry out the true intent

of the Court, that intent may be perfected and carried out pursuant to the retained jurisdiction, as set forth by paragraph 14, page 14 of the judgment.

If, on the other hand, we are to assume that the Court is without jurisdiction, no jurisdiction retained, that an appeal has been taken, then Mr. Landrum is in error in saying that the Federal Rules do not apply. If that is true, then the Federal Rules do apply. For that reason I specifically mention the Federal Rules, particularly 75(h), in my memorandum of points and authorities, where there is an expressed authority granted either at the instance of the trial court or the instance of the appellate court, to modify and correct a judgment.

While I am not informed as to whether the 90-day period has now expired since the adjournment of Congress, so that the new rules are now effective, they contain additional provisions, but they also contain this identical provision 75(h) of the original rules, so that even if they are now effective by virtue of the expiration of the 90-day period since the last adjournment of Congress, even under those new rules the Court would have ample authority to do what is here sought.

With reference to Mr. Landrum's statement as to the understanding had between John M. Martin, as counsel for these defendants, and Mr. Ralph Littrell, I shall not go into that, other than to say that that understanding was not carried out. It is a matter which does not concern this Court on the hearing of this motion, unless the Court wants to confirm that understanding and ascertain what it was.

If the Court does want to ascertain it, I would like, by proper method, to show by Mr. Joe McPherson the instructions he did receive from Mr. Littrell. I would

like to show that later, the day before the trial at San Diego, when I found Mr. [13] Landrum was to try this case and Mr. Landrum told me he was not in a position to carry out those instructions and couldn't do it, I then called Mr. McPherson and explained to him the position Mr. Landrum had taken.

If we are going into that at all, I think it should be by testimony or affidavit of Mr. Littrell or Mr. McPherson and not merely on statement of counsel. For that reason I won't go into it, because it is not a matter—the negotiations were had first-hand with Mr. Landrum. I feel it would be unfair to go into it.

I do say that understanding was not carried out. I recall that on one occasion, out of the hearing of the jury, at the Court's bench, I said, "Mr. Landrum, you are again raising on me the question of jurisdiction in this case."

I don't think there is anything that the Court or counsel can do about that matter. If it is a misunderstanding, I am sorry it occurred. It has no weight or merit in the consideration of the matter before the Court.

The Court: This matter has given the Court some concern.

The Court has again refreshed its mind on the record. It did so to some extent at the time of the consideration of the motion for a new trial, but it has again reviewed the record in the case. The mind of the Court, I think, is pretty clearly expressed in the record. I have several portions of the record that elucidate the mind of the trial judge during the progress [14] of the trial, when the jury was present and in the absence of the jury, particularly the latter, with respect to the matter under consideration.

I wish it understood that while the Court will not detail all of the portions of the record that indicate the aspect of the situation that is now being discussed, it thinks it will be able to indicate sufficient to show clearly that the mind of the Court during the trial was resolute on one aspect of the case, and that was the question of the option.

On page 432 of the transcript, line 13, the following appears:

"Mr. John M. Martin: If the court please, at no time have we contended nor do we now contend that we had any right to the free rent use of any part or portion of this yard, its facilities or machinery, for any purposes other than ship work for the United States government.

"Mr. Landrum: Here is another angle to this case, if your Honor please,—

"The Court: Why can't you dispose of that matter by a concession in the presence of the jury?

"Mr. Landrum: I am perfectly willing to do that but I think it would be material—if your Honor please, the thing we are concerned with here is the valuation of that leasehold interest. If they contend for a lease, the value of that lease is dependent upon how much it costs [15] them to stay in that ship-yard. They have expenditures for insurance, for taxes, for guards, and all of those things. Now, if they contend that that leasehold has a value, what it will cost them to have that leasehold is admissible as going to the question of its value. We propose to show that they did have those expenses and that they even asked the government to pay a part of them.

"The Court: I think you are unnecessarily complicating the problem. The law of the case has been established as to the right to compensation for the leasehold. It is the option feature, of course, that is the only complex situation in the case. Otherwise, the General Motors principle and the principle laid down in the other cases that have followed the General Motors case are clearly determinative of the leasehold question, and that is going to be followed in this case. We are not going to overrule the principle of the General Motors decision for the injury that the lessee is put to by reason of the lawful termination of this lease.

"When it comes to the question of value of the option, it seems to me that the case can be simplified by the optionee preserving in the Court of Claims anything subsequent to the date of the termination of the project.

"Mr. John M. Martin: Our theory is that there is a deadline, that there was a deadline, of December 23, 1944, [16] the date when the government took, by operation of law, our leasehold estate, and as to this lawsuit I am limited to the market value of that.

"If, by virtue of some other contract with the government, they have agreed with me that I possess certain other rights covering the period subsequent to December 23, 1944, such rights are not involved.

"The Court: Do you take any different position?

"Mr. Landrum: No, your Honor. My position is simply this, that it is true that we are fixing the just compensation as of December 23, 1944, for the taking of this lease, coupled with an option, but I

contend that the question of how much that is worth is what is before this jury now. If I could say to the witness, 'Mr. Witness, in case you did retain that lease that you are claiming was valuable, how much would you have had to pay out in costs'—

"The Court: That is all within the terms of the date of fixation.

"Mr. John M. Martin: That is right, and I have no objection to that line. That was all I was asking for. I asked him if it wasn't a fact they had to pay rental at the rate of 10 cents—

"The Court: Anything that comes within the period up to December 23, 1944, is a relevant matter to this [17] case. Anything that occurred subsequent to that is not relevant in this case. I am not saying that there may not arise in some other forum a claim for frustration breaches and so forth, for damages of that kind."

Mr. John M. Martin: Pardon me. I would like for the record to show that it was Mr. Landrum who made the statement at line 20, page 434, and not Mr. Martin.

The context there will show that.

Mr. Landrum: If I made it, I made it.

Mr. John M. Martin: That was your statement.

The Court: I don't recall that. That is something I wouldn't recall. It does seem that is contextual there.

Mr. Landrum: I don't know, your Honor, whether I said it or not.

Mr. John M. Martin: Very well.

Mr. Landrum: I suppose I did, if he says I did.

The Court: Let us continue on page 435, at line 5. Let me say parenthetically, before we do that, there is

a clear indication in the mind of the Court on this question of frustration, and the Court had entertained that throughout the case, that the question of the option was not necessarily correlated, insofar as condemnation was concerned, with the question of the leasehold estate. The question of the leasehold estate, I think, clearly was a matter that was subject to evaluation and award in this condemnation proceeding. [18]

There is nothing in Judge Yankwich's ruling that is counter to that conclusion, in my judgment. There is not anything in the ruling, either on pretrial by Judge Yankwich or during the rulings on evidence by the trial judge, or during the discussions with counsel in the absence of the jury, at the bench, but what indicates that it was clearly in the mind of the Court that if there be any question of frustration, that we were not in the proper forum in which to ascertain that feature of the case.

On page 435, commencing with line 5, the following appears:

"Mr. Landrum: I am afraid I am not getting my point over to you. I am sorry. To boil it down, it is simply this, your Honor. If they are in this case contending that they had the right to stay there, the right to possession under that leasehold, I am entitled to show how much that right of possession would have cost.

"Mr. John M. Martin: We do not contend we had a right to stay there after it was condemned.

"The Court: How could they contend that they had a right to stay there after the government terminated the contract?

“Mr. Landrum: No, your Honor; I am not saying it that way. That isn’t what I say. In arriving at the value of this lease, counsel said in his opening statement [19] that they had a lease under which they could stay there until 1949.

“Mr. John M. Martin: We couldn’t once the government terminated it.”

“The Court: That was a pure prospective eventuality and that prospective eventuality was terminated by the government.

“Mr. Landrum: And the question is how much have they lost by reason of our termination of it. And what they lost must be determined by what it would cost to keep it.

“Mr. John M. Martin: There is no objection to that.

“The Court: You don’t seem to be at variance on that.

“Mr. John M. Martin: Your Honor, I am in rather a peculiar situation. My position here is that my client has another agreement, that is not involved, dated August 9, 1945, by which the Maritime Commission has agreed that, for instance, my attorney’s fees are an item of expense.

“The Court: Of course, you can’t determine those here.

“Mr. John M. Martin: No; I don’t want to do it and I don’t want it before the jury. But, if counsel for the government starts to go into all of the contracts my client has entered into since December 23rd— [20]

"The Court: He says he is not going to do that and, if he attempts to do so, he will not be permitted to do it.

"Mr. John M. Martin: I want a separate right to go to the Court of Claims—

"The Court: I have been trying, as far as we can, to keep this case separate and apart from any additional claim that the defendants may have against the government, which is litigable in the Court of Claims, and we will do that by adhering to that deadline of December 23, 1944. Anything that occurred subsequent to that is irrelevant to this issue unless the defendants bring it in themselves, and, if they do, then you have a right to respond to it.

"Mr. Landrum: Could I ask your Honor this? I trust that your Honor will indicate whether you think it is correct or not. It is, if the question is the value of that leasehold interest, then may I not be permitted to show how much it would cost them?

"The Court: I don't know what you will be permitted to show. I think I know the rule established by those cases which were mentioned.

"Mr. Landrum: I am very familiar with the Petty Motors and the General Motors cases.

"The Court: Then, why don't you follow the doctrine [21] of those cases? I am not going to overrule the Supreme Court. They fix the rule pretty strictly there. Let's follow the Supreme Court.

"(Thereupon the proceedings were resumed within the presence and hearing of the jury:)"

I could mention several other excerpts that substantiate that view as being the view of the Court on the questions now under consideration.

In signing this judgment, there appears to be a statement in the judgment that is at variance with the mind of the Court, and was at the time the judgment on the verdict was signed. I will call attention to that.

I want it also noted that the proposed judgment does not appear to have been endorsed by any of counsel for Tavares Construction Company interests.

It was endorsed by the other defendants in the case, but I think there was no endorsement by them. Am I not correct, gentlemen?

Mr. John M. Martin: That is correct. And the record will show a specific objection just prior to being signed.

Mr. Landrum: At the time the judgment was presented to your Honor, they had not approved it, but Mr. Martin stated in the record, and it is in the record, his objection to that judgment. And it is not the objection he makes now.

Mr. John M. Martin: The objection, as near as I can [22] recall was that the record did not support the judgment. I can turn, in just a moment, your Honor, to what I said. It is at page 3 of the proceedings on the motion for new trial had on June 6, 1947.

The Court: What page was that?

Mr. John M. Martin: Page 3. It starts at the top of the page.

The Court: That does not touch the question that is under consideration now. The judgment, commencing on line 28, page 13, paragraph 10, reads:

“That the just compensation for the condemnation and taking by plaintiff of all right, title, and interest of defendants Tavares Construction Company, Inc., Concrete Ship Constructors, Lloyd S. Stroud, R. S. Seabrook, Stroud-Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, in and to the real property designated as Parcels 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and A and hereinafter described, and all improvements, facilities and fixtures located thereon, and the option, leasehold and possessory rights granted to said last named defendants, or any of them, by that certain lease and agreement dated December 27, 1941, between Defense Plant Corporation and Tavares Construction Company, Inc., as amended (commonly known as Plancor 407, as amended), is nothing;” [23]

Then, in paragraph 11, commencing on line 8, at page 14 of the judgment, the following matter appears:

“That all right, title and interest of defendants Tavares Construction Company, Inc., Concrete Ship Constructors, Lloyd S. Stroud, R. S. Seabrook, Stroud-Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, in and to the real property designated as Parcels 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and A and hereinafter described, and all improvements, facilities and fixtures located thereon, and the option, leasehold and possessory rights granted to said last named defendants, or any of them, by that certain lease and agreement dated De-

cember 27, 1941, between Defense Plant Corporation and Tavares Construction Company, Inc., as amended (commonly known as Plancor 407, as amended), have become and are hereby vested in the United States of America;"

The Court inadvertently and without any intent to do so signed that judgment with that word "option" in there, in that portion of the judgment.

I think it is clear that the trial court, while following what it conceived to be, and what appeared to it was, the ruling on pretrial, it did not enable this Court in condemnation to fix a value for what may or may not have been the frustration of an option right of the Tavares Construction Company [24] interests. It was and is this Court's view that there should be no feature of this case that would prevent the interested parties, if any, from litigating as to what this Court conceives and did throughout the trial conceive to be the proper forum.

The problem comes in just how to express that appropriately under the applicable rules of procedures. I may say it has been our belief that the amended Rules of Civil Procedure are not yet in effect. There seems to be a difference of opinion among the districts.

In a written decision by Judge Wyzanski of Boston the other day, he held that the rules were not effective, that the Congress had not adjourned since sine die and therefore the rules as promulgated, prior to the amendments, by the Supreme Court would still be the rules of procedure in the District Courts; while Judge Reeves, of one of the Missouri Districts, at Kansas City, held counter to that; so the matter is in debate.

My own view is, and I think that is the consensus of our judges here—and I am not speaking for any of them at all—that the amendments to the rules are not effective. Even if they were, there would be no change in the situation here. The matter is how to reach it without, at least seemingly, being contumacious as far the Court of Appeals is concerned. I do not want the Court of Appeals to feel in any way that this Court, after an appeal had been taken, would feel as though it had jurisdiction in the sense [25] of deciding something differently from what it has always decided.

This Court's mind has always been centered on the fact that if there was any frustration of this contract it was not a compensable item in an eminent domain case. The deadline occurred on December 23, 1944, and that deadline was occasioned by the activity of the Government in taking over the leasehold. The question is if this is of an equitable character that could be reached in the Court of Claims on the theory of frustration of a contract. That, of course, is not one of those items that could be properly evaluated in an eminent domain proceeding.

I think probably we have a right to strike those words from the judgment.

There is a rule here, Rule 60 of the Rules of Civil Procedure, which reads:

“(a) Clerical Mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

“(b) Mistake, Inadvertence; Surprise, Excusable Neglect. On motion of the court, upon such terms as are just, may relieve a party or his legal representative [26] from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Sec. 57 of the Judicial Code, U. S. C., Title 28, Sec. 118, a judgment obtained against a defendant not actually personally notified.”

Do you think, gentlemen, that by striking that word from the judgment that the judgment will then conform to what the Court has expressed to be its opinion throughout?

Mr. John M. Martin: I believe it will, your Honor, particularly in the light of the explanation showing the intent. If there is any doubt about it, I do not see why the Court could not insert a sentence in the judgment which, in substance, said that “The Court finds it is without power in this proceeding to determine the question of just compensation under the option.” That is the substance, as I understand the Court’s view, of this case, and has always been the Court’s view of this case. If there is any question as to whether [27] that view must be expressed, not only in the trial record but also

in the judgment itself, certainly in the interest of clarity I would like to have it definite.

The Court: I do not want to do this: I do not want either the litigants or any reviewing authority, or any other applicable judicial authority, to get the impression that this Court is changing its mind in the case or that it has any doubt but what it gave to the jury the law of the case in its instructions. I think I have shown that by the excerpts that have been read, and there are others that will substantiate that. There is nothing I have found that would operate to remove that impression. That was never in the mind of this Court, that any question of frustration of contract was litigated and terminated and adjudicated in this action of eminent domain.

Mr. Landrum: If your Honor please, may I respectfully say that the Government must stay with the position that it has already taken. We feel that your Honor is without jurisdiction. And may I also say this, your Honor please: We spent days in the trial of this case, upon the very question of the market value of that option. I objected to it, and it is in writing in this record, to the introduction of any testimony as to the market value of that option.

That objection indicates, if your Honor please, I feel, that the agreement which Mr. Martin claims he made with Mr. [28] Littrell was carried out to the letter. We did litigate the question of the market value of that option which was cut off by this condemnation. I say that for the purpose of the record, and I cannot change it.

The Court: I think we will conclude the matter by striking those words from the judgment, gentlemen, and leaving the judgment as it will be with those words stricken.

Mr. Landrum: Could I ask what the exact words were, your Honor?

The Court: I thought I had gone over those once.

Mr. Landrum: Your Honor stated this: "The Court inadvertently and without any intent so to do signed that judgment with that word 'option' in there."

The Court: I called attention to the paragraphs in which it was.

Mr. Landrum: Yes, you did, your Honor. I understand your Honor intends to strike one word only, and that is the word "option."

The Court: That is all.

I call attention further to another observation which to me strengthens the determination as to what was the action of the Court. The verdict of the reads thus:

"In the District Court of the United States  
In and for the Southern District of California  
Southern Division [29]

"United States of America, Plaintiff, vs. Certain Parcels of Land in the City of National City, County of San Diego, State of California; Tavares Construction Company, et al., Defendants. No. 248-SD Civil.

#### VERDICT

"We, the Jury in the above-entitled cause, sworn and empanelled to determine just compensation for the condemnation and taking of certain property herein involved, find the just compensation to be as follows:

"Parcel 9 (known as the Johnson land) \$ 6,750.00

Parcels 1, 2, 3, 5, 6, 7, 8 and A (known  
as the City of National City Land) . \$650,000.

Out of which last named sum we allocate  
to the San Francisco Bridge Company as  
just compensation for the condemnation  
and taking of its leasehold interest . \$ 50,000.

To Tavares Construction Company, Inc.,  
a corporation, Concrete Ship Construc-  
tors, a joint venture, Lloyd S. Stroud,  
R. S. Seabrook, C. M. Elliott, Carlos  
Tavares, Henry M. Page, Don F. Gates  
and Stroud-Seabrook, a copartnership,  
for the condemnation and taking of all  
their interests under the agreement of  
December 27, 1941 (known as Plancor  
407, as amended) \$ 0 [30]

"Dated: San Diego, California, February 27, 1947.

"A. E. Roberts, Foreman."

Now, anything that occurred subsequent to December 23, 1944, could not have been subject to that appraisement, and therefore the question of the frustration of a contract, which is not a question of the appraisement of the value of the property that is taken.

It may be there will be features that could not be properly considered in an eminent domain case in the appraisement of a piece of property, whether it be real, personal, or mixed, that is taken, that would be properly considered in a proceeding before the Court of Claims.

Now, there are two other recitals in the judgment wherein that word "option" is mentioned.

Mr. John M. Martin: That is particularly true, your Honor, at page 8, line 17, XI of the judgment.

The Court: Yes. That is the word "option" on line 17 of page 8 of the recorded and entered judgment.

Then there are two or three recitals earlier in the judgment where the word is used again. But that may be merely a recital.

Page 2, line 27:

"Thereupon, evidence both oral and documentary having been introduced by and on behalf of plaintiff and said defendants upon the issues before the court and jury, [31] including the issue of the just compensation and the fair market value of Parcels 1, 2, 3, 5, 6, 7, 8, 9 and A, and the right, title and interest of defendants Tavares Construction Company, Inc., Concrete Ship Constructors, Lloyd S. Stroud, R. S. Seabrook, Stroud-Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, in and to Parcels 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and A herein, and all improvements, facilities and fixtures located thereon, and the option, leasehold and possessory rights granted said last named defendants, or any of them, by the aforesaid lease and agreement dated December 27, 1941, as amended, and the jury having heard and deliberated upon the evidence and having reported to the court its Verdict."

It appears again on line 15, page 6, paragraph VII, which reads as follows:

"That plaintiff, by its Declaration of Taking No. 1, filed herein on October 3, 1944, its Amended Declaration of Taking filed herein on December 23, 1944, its Amended and Supplemental Complaint in

Condemnation herein, and its Bill of Particulars filed herein on April 16, 1945, which Bill of Particulars is considered as an amendment to plaintiff's Amended and Supplemental Complaint in Condemnation, has taken and condemned all of the interests of defendants Tavares Construction Company, Inc., Concrete [32] Ship Constructors, Lloyd S. Stroud, R. S. Seabrook, Stroud-Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, in and to the real property designated as Parcels 1, 2, 3, 4, 5 6, 7, 8, 9, 10, 11 and A, and hereinafter described, and all improvements, facilities and fixtures located thereon, and the option, leasehold and possessory rights granted to said last named defendants, or any of them, by that certain lease and agreement dated December 27, 1941, between Defense Plant Corporation, and Tavares Construction Company, Inc., as amended (commonly known as Plancor 407, as amended)."

I think the word "option" should be stricken there, and it is stricken there.

The term is used in paragraph X, but I don't know whether the use of it therein runs counter to the views of the Court on the matter.

Paragraph X, beginning on line 23, page 7, reads thus:

"That prior to December 23, 1944, defendant Tavares Construction Company, Inc., was the lessee of the real property designated as Parcels 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and A and described in plaintiff's Declaration of Taking No. 1, Amended Declaration of Taking and Amended and Supplemental Complaint in Condemnation, and hereinafter described, together

with all improvements, [33] facilities and fixtures located thereon, under that certain lease and agreement dated December 27, 1941, between Defense Plant Corporation, an agency of plaintiff, and Tavares Construction Company, Inc., as amended (commonly known as Plancor 407, as amended), which lease and agreement also granted to defendant Tavares Construction Company, Inc., certain option rights to purchase said real property, together with said improvements, facilities and fixtures, and that Carlos Tavares, Henry M. Page and Don F. Gates, no other person or persons have or then had any right, title, interest or estate in and to said lease and agreement except the defendants Concrete Ship Constructors, Lloyd S. Stroud, R. S. Seabrook, Stroud-Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates."

Mr. John M. Martin: That is merely a recital that we are the owner of that interest.

The Court: I do not think that—

Mr. John M. Martin: There is no reason to change that.

The Court: I believe we have indicated wherein the entered judgment does not reflect the judgment of the Court, and accordingly it should be entered so as to indicate the views of the Court.

Mr. Landrum: If your Honor please, I take it that your Honor's order will be reduced to writing?

The Court: I would think so. Either that or I should [34] sign this oral opinion.

Mr. Landrum: May the record show, your Honor, that the Government respectfully excepts to your Honor's order and ruling made at this time?

The Court: It may so show. I do not think we should amplify the record in any other way, gentlemen. In other words, if the matter proceeds on review in the Court of Appeals or elsewhere, I want those courts to know just what this Court is doing. I am not going to amplify that judgment. I think it does not show what the Court did or what was in the mind of the Court. I think the oversight or omission should be succinctly stated. And, Mr. Landrum, that you should remain here until such time as it is submitted, and it should be submitted, I think, with celerity, so you can get away, so that it will not be left to someone else here to determine whether or not the record will reflect what the Court is doing.

Mr. John M. Martin: If the Court please, due to the fact this motion was pending, I have heretofore applied to the Circuit Court of Appeals for an extension of time in order that whatever ruling and record is made here may be transmitted as a part of the record on appeal. The time has now been extended to December 24, 1947.

It seems to me there is no way that I could state, or that anyone else could state, more clearly your Honor's views [35] than you have heretofore stated them in the record. If that record, as stated by your Honor, is made a part of our record on appeal and is transmitted, as we have and will request, it seems to me it would more accurately portray what your Honor has in mind

than for me to attempt or Mr. Landrum to attempt to put it in our own words.

The Court: That strikes me as being the proper way to do it. But I want to do it in a way that will preserve the rights of the litigants and at the same time give to the reviewing court just what has been done.

Mr. John M. Martin: I shall present no order unless directed by the Court specifically so to do.

Mr. Landrum: Does your Honor wish me to present one?

The Court: Do you desire to?

Mr. Landrum: No, I would prefer not to.

The Court: I think not. The only thought I had was whether the Court of Appeals would consider the transcript of this record. If it will, I will be glad to have them do so, because it is precisely as I desire to state it.

Mr. John M. Martin: I think that is the better way to do it. I prefer and will send the entire record up as a part of the appeal record and file a copy so Government counsel will have a copy.

Mr. Landrum: May the record show that the Government object to any such procedure as that, your Honor. [36]

The Court: The Government will object to their transmitting that record.

Mr. Landrum: Yes.

The Court: Are you going to object to it on any other ground than the jurisdictional ground that you have urged heretofore?

Mr. Landrum: On the ground the Court is without jurisdiction. This matter is already up on appeal. The record has been set and made.

The Court: That is the only ground?

Mr. Landrum: Yes, your Honor.

The Court: I ruled on that.

You are authorized to have this record prepared, and, so far as this Court is concerned, to transmit it to the Circuit Court of Appeals or any other appropriate agency, judicial or otherwise.

Mr. John M. Martin: Miss Reporter, will you make an original and four carbons for me?

The Reporter: Yes, sir.

(Whereupon, at 12:20 o'clock p. m., December 2, 1947, the hearing in the above-entitled matter was closed.)

[Endorsed]: Filed Dec. 8, 1947. Edmund L. Smith,  
Clerk. [37]

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[Endorsed]: No. 11820. United States Circuit Court of Appeals for the Ninth Circuit. Tavares Construction Company, Inc., a corporation, Concrete Ship Contractors, a joint venture, Stroud-Seabrook, a copartnership, Lloyd S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Southern Division.

Filed December 23, 1947.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for  
the Ninth Circuit

United States Circuit Court of Appeals  
Ninth Circuit

No. 11820

TAVARES CONSTRUCTION COMPANY, INC., a corporation, CONCRETE SHIP CONSTRUCTORS, a joint venture, STROUD-SEABROOK, a copartnership, L. S. STROUD, R. S. SEABROOK, C. M. ELLIOTT, CARLOS TAVARES, HENRY M. PAGE and DON F. GATES,

Appellants

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION BY APPELLANTS FOR EXTENSION  
OF TIME TO FILE THE RECORD AND  
DOCKET THE APPEAL

The above named Appellants respectfully petition the above entitled Court for an extension of time to file the Record and Docket the Appeal in the above entitled matter upon the following grounds:

1. That on August 26, 1947 Appellants filed their and the first Notice of Appeal to the above entitled Court from the Judgment in the action entitled "United States of America, Plaintiff, vs. Certain Parcels of Land in the City of National City, County of San Diego, State of California; Tavares Construction Company, Inc., et al., Defendants," No. 248-SD Civil in the District Court of the United States, Southern District of California, Southern Division.

2. That the District Court has heretofore, pursuant to stipulation of the parties extended the time for filing the record and docketing the Appeal for the full time permitted by Rule 73(g) of the Federal Rules of Civil Procedure, which time expires on November 24, 1947.
3. That there is now pending before the District Court a Motion to Correct and Modify the Record and Judgment, which Motion is now set for hearing on December 2, 1947.
4. That it is necessary and appropriate that the time for filing the record and docketing the Appeal be extended sufficient time to enable the District Court to act upon said Motion and to enable the Clerk to thereafter prepare and transmit the record with such corrections as may be ordered to the Appellate Court.

Wherefore, Appellants pray that the Court make and enter an Order extending the time for the filing of the record and docketing the Appeal to and including December 24, 1947.

Dated this 20th day of November, 1947.

JOHN M. MARTIN and  
FRANK L. MARTIN, JR.

By Frank L. Martin, Jr.

Attorneys for Appellants

[Verified.]

ORDER

Pursuant to the above and foregoing petition, and good cause appearing therefor:

It Is Hereby Ordered that pursuant to Rule 13 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, the time for filing the record and docketing the Appeal in the above entitled cause is hereby extended to and including December 24, 1947.

Dated this 20th day of November, 1947.

ALBERT LEE STEPHENS

Judge of the United States Circuit Court of Appeals,  
Ninth Circuit.

[Endorsed]: Filed Nov. 21, 1947. Paul P. O'Brien,  
Clerk.

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[Title of Circuit Court of Appeals and Cause]

APPELLANTS' STATEMENT OF POINTS ON  
WHICH THEY INTEND TO RELY ON AP-  
PEAL

Come now the Appellants and, pursuant to Rule 19 of the above entitled Court, state the points on which they intend to rely on their appeal, as follows:

1. The District Court erred in instructing the jury that if the jury found that Appellants' lease could not have been sold, then their verdict will be zero.
2. The District Court erred in failing to instruct the jury that it should assume that Appellants' lease could be sold.

3. The District Court erred in instructing the jury that the amount of their verdict for Appellants should be the amount that the Appellants' lease could have been sold for on the open market for cash on December 23, 1944, or shortly thereafter, above what Appellants would have to have paid under all its terms and conditions.

4. The District Court erred in instructing the jury that Appellants' lease had been cancelled by this proceeding.

5. The District Court erred in instructing the jury that if the jury found that the interest of Appellants under their lease was so speculative and conjectural that no purchaser in the open market would have purchased the same except for a nominal consideration, that then their verdict as to Appellants must be in a nominal figure only.

6. The District Court erred in failing to interpret for the jury Appellants' lease, and further erred in failing to instruct the jury as to the legal rights of the lessor and lessee thereunder as interpreted by the Court.

7. The District Court erred in failing to instruct the jury that the interpretation of Appellants' lease as testified to by Appellee's witnesses was erroneous.

8. The District Court erred in finding and holding that the measure of just compensation for the taking of Appellants' lease was limited to the market value thereof and wholly dependent upon whether such lease could be sold.

9. The District Court erred in excluding evidence as to the taking being a breach of contract by Appellee.

10. The District Court erred in excluding evidence as to the right which Appellants would have had to sue in

the United States Court of Claims for breach of contract and as to the value of such right, had Appellee, instead of filing the Amended Declaration of Taking and its Amended and Supplemental Complaint, merely refused on December 23, 1944 to further perform its obligations under Appellants' lease with Appellee.

11. The District Court erred in holding that it was without power to determine in this proceeding the amount of just compensation which Appellants were entitled to recover for the taking, cancellation or frustration of Appellants' option rights contained in Appellants' lease by reason of the condemnation of Appellants' lease.

12. The District Court erred in failing to instruct the jury that Appellants were entitled to recover as just compensation in this action for the taking of Appellants' option rights the difference between the option price of the shipyard site, facilities and machinery, and the reasonable value of the shipyard site, facilities and machinery as of December 23, 1944.

13. The District Court erred in admitting in evidence correspondence between Appellants and Appellee as to Appellants' offer of compromise.

14. The evidence is insufficient to justify the verdict of zero and the judgment of nothing.

15. The verdict of zero and judgment of nothing are contrary to the evidence.

16. The verdict of zero and judgment of nothing do not constitute compensation and are against law.

17. The verdict and judgment as to Appellants are a miscarriage of justice and the taking of private property without just compensation.

18. The District Court erred in denying Appellants' Motion for a New Trial.

Dated this 16th day of December, 1947.

JOHN M. MARTIN and  
FRANK L. MARTIN, JR.

By Frank L. Martin, Jr.

Attorneys for Appellants

Copy received, Dec. 17th, 1947. Joseph F. Mc Pherson,  
Spec. Asst. to Atty. Gen.

[Endorsed]: Filed Dec. 23, 1947. Paul P. O'Brien,  
Clerk.

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[Title of Circuit Court of Appeals and Cause]

APPELLANTS' PETITION FOR ORDER FOR CERTAIN EXHIBITS TO BE CONSIDERED IN ORIGINAL FORM AS PART OF APPEAL

Appellants respectfully petition the above entitled Court for an Order that the following exhibits will be considered in their original form as a part of the record on appeal without the necessity of incorporating them in the printed record:

1. The following exhibits which pertain primarily to the issues as to defendants other than appellants and probably not necessary for the determination of this Appeal, but which should be considered as a part of the

record on appeal in order that the complete record may be before the Court:

(a) Plaintiff's Exhibit No. 1 and Defendants' Exhibits D, E, F, K and N, being large maps of the parcels and area.

(Exhibit S, being a large map showing the shipyard as of the date of taking will be printed in the record.)

(b) Defendants' Exhibits A, B, C, L, M, X, Y and Z, being various leases and letters relating to interests of defendants other than appellants.

2. The following exhibits which are photographs are not of sufficient importance other than to give the Court a view of various portions of the shipyard, and which can be better viewed from the originals:

Defendants' Exhibits G, H, I, J, O, P, T and U.

(Exhibit J is a large panorama view and would be very difficult of reproduction.

Exhibit V, being an airview photograph of the shipyard will be printed in the record.)

3. Defendants' Exhibit R, being a large model of the Shipyard, is impossible of reproduction in the printed record. (Exhibit S, which is a large map depicting everything shown on the Model, will be printed in the record.)

Appellants believe that because of the nature of the aforesaid exhibits and the limited use thereof on the appeal that not only unnecessary encumbering of the printed record can be avoided by the granting of this petition but that such use as the Court may desire to make of such exhibits can be better afforded by examining the originals in most instances.

Wherefore, Appellants pray that this petition be granted and for an Order of the Court that Plaintiff's Exhibit 1 and Defendants' Exhibits A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, R, T, U, V, X, Y, and Z be considered as a part of the record on appeal without the necessity of incorporating them in the printed record.

Respectfully submitted,

JOHN M. MARTIN and  
FRANK L. MARTIN, JR.

By John M. Martin

Attorneys for Appellants

[Verified.]

Received copy this 17th of December, 1947. Joseph F. McPherson, Spec. Asst. to Atty. Gen.

## ORDER

Pursuant to the above and foregoing Petition and good cause appearing therefor:

It Is Hereby Ordered that Plaintiff's Exhibit 1 and Defendants' Exhibits A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, R, T, U, V, X, Y and Z be considered as a part of the record on appeal in their original form without the necessity of incorporating them in the printed record.

Dated this 29th day of December, 1947.

FRANCIS A. GARRECHT

Judge of the United States Circuit Court of Appeals,  
Ninth Circuit.

[Endorsed]: Filed Dec. 29, 1947. Paul P. O'Brien,  
Clerk.

[Title of Circuit Court of Appeals and Cause]

ORDER THAT EXHIBITS "S" AND "V" NEED  
NOT BE PRINTED WITHIN PRINTED TRAN-  
SCRIPT

Good cause therefor appearing, It Is Ordered that Exhibits "S" and "V", being a large aerial photograph and a large photostatic map, need not be reproduced in the printed transcript of record, but will be considered by the Court in their original form.

FRANCIS A. GARRECHT  
Senior United States Circuit Judge

Dated: San Francisco, Calif., January 13, 1948.

[Endorsed]: Filed Jan. 13, 1948. Paul P. O'Brien,  
Clerk.

